MINORITY VIEWS OF HON. HENRY A. WAXMAN, HON. TOM LANTOS, HON. MAJOR R. OWENS, HON. EDOLPHUS TOWNS, HON. PAUL E. KANJORSKI, HON. CAROLYN B. MALONEY, HON. ELEANOR HOLMES NORTON, HON. CHAKA FATTAH, HON. ELIJAH E. CUMMINGS, HON. DENNIS J. KUCINICH, HON. ROD R. BLAGOJEVICH, HON. DANNY K. DAVIS, HON. JOHN F. TIERNEY, HON. JIM TURNER, AND HON. HAROLD E. FORD, JR.

I. INTRODUCTION

The committee's Waco investigation began as many of the committee's other investigations have begun: with a false accusation. In August 1999, after the media reported that the FBI had used pyrotechnic tear gas rounds at Waco, Representative Dan Burton accused Attorney General Janet Reno of covering up key facts and said that she should be removed from office. On one nationally broadcast radio program, Mr. Burton said that Attorney General Reno "should be summarily removed, either because she's incompetent, number one, or, number two, she's blocking for the President and covering things up, which is what I believe." [1]

In September 1999, Mr. Burton renewed his accusations of a cover-up by asserting that the Justice Department did not provide Congress with documents detailing the FBI's use of military tear gas rounds near the Branch Davidian compound on April 19, 1993. In particular, he accused the Justice Department of deliberately concealing the 49th page of an FBI lab report, which contained a reference to a spent military tear gas round. Prior to conducting any meaningful investigation, Mr. Burton said on national television, "With the 49th page of this report not given to Congress, when we were having oversight hearings into the tragedy at Waco, and that was the very definitive piece of paper that could have given us some information, it sure looks like they were withholding information. And she's responsible." [2]

Mr. Burton's allegations turned out to be untrue. Representative Henry A. Waxman pointed out that the Justice Department had produced documents to the committee in 1995 that contained numerous explicit references to military tear gas rounds.[3] Former Senator John C. Danforth then thoroughly investigated the matter as Special Counsel. He found that there was no cover-up by the Attorney General. In fact, Senator Danforth found that the 49th page had never been missing at all. According to Senator Danforth's report: "[T]he Committees were provided with at least two copies of the lab report in 1995 which did contain the 49th page. *The Office*

[1] "Morning Edition," NPR (Aug. 31, 1999).
[2] "Fox News Sunday," Fox News (Sept. 12, 1999).
[3] Letter from Representative Henry A. Waxman to Senator John C. Danforth (Sept. 13, 1999) (attached as exhibit 1).

of Special Counsel easily located these complete copies of the lab report at the Committees' offices." [4]

This committee's investigation into Waco should have ended on September 9, 1999, when Attorney General Reno appointed Senator Danforth to serve as Special Counsel to investigate lingering questions related to the Branch Davidian standoff in 1993. Since that date, Mr. Burton's investigation has been unnecessary, expensive, and fruitless. He has required Federal agencies to produce nearly 800,000 pages of documents, called more than 80 witnesses to appear for interviews, and dispatched committee staff across the country from Puerto Rico to Texas. And despite the duration and cost to the Federal Treasury, his investigation has contributed virtually nothing to the public's understanding of the Waco tragedy.

On the substance of this investigation, we concur with the major findings of Senator Danforth and with the findings of fact issued by Judge Walter S. Smith, Jr., of the U.S. District Court for the Western District of Texas.[5] Senator Danforth and Judge Smith both concluded that the government did not cause the fire at the Branch Davidian complex and did not direct gunfire at the Branch Davidian complex on April 19, 1993. We also concur with Senator Danforth's conclusion that the government did not improperly employ U.S. armed forces during the Waco standoff and that senior Justice Department and FBI officials—including Attorney General Janet Reno and FBI Director William Sessions—did not knowingly make false statements about the FBI's use of pyrotechnic tear gas rounds on April 19, 1993.[6]

Although one can with hindsight second guess decisions made at virtually all levels of the FBI and Justice Department, the fact remains that the Federal officials involved in the Waco standoff acted lawfully and with great restraint under difficult circumstances. As both Senator Danforth and Judge Smith concluded, the responsibility for the Waco tragedy lies with certain Branch Davidians and particularly their leader, David Koresh.[7]

II. Mr. Burton Began His Investigation With Erroneous Charges

Mr. Burton, in a pattern that has become typical of this committee, first alleged wrongdoing by a Clinton administration official and then proceeded to investigate.[8] In August 1999, the press reported that pyrotechnic tear gas rounds had been used at Waco, contrary to statements made by Attorney General Reno and other

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[4] John C. Danforth, Special Counsel, "Interim Report to the Deputy Attorney General Concerning the 1993 Confrontation at the Mt. Carmel Complex, Waco, Texas" (July 21, 2000) (hereinafter "Danforth report") (attached as exhibit 2).

[5] Amended findings of fact and conclusions of law, *Andrade* v. *United States,* No. W–96–CA–139 (W.D. Tex. filed Sept. 27, 2000) (hereinafter "findings of fact and conclusions of law") (attached as exhibit 3).

[6] Danforth report at 51. The minority has no information to substantiate or refute Senator Danforth's interim findings that a staff attorney for the FBI failed to disclose that an FBI agent used pyrotechnic tear gas rounds and gave conflicting information to Senator Danforth's investigators. Committee staff interviewed this individual, Jacqueline Brown, on Jan. 7, 2000. The minority staff found her to be cooperative and truthful in her responses to the questions posed by committee staff.

[7] Danforth report at 5; findings of fact and conclusions of law at 10.

[8] A report recently released by Representative Waxman describes many similar allegations that have occurred over the last 6 years. See "Unsubstantiated Allegations of Wrongdoing Involving the Clinton Administration," Minority Staff Report, Committee on Government Reform (Oct. 2000) (attached as exhibit 4).

officials that the FBI had only used nonpyrotechnic tear gas rounds.[9] Mr. Burton immediately attacked the Attorney General, stating on one nationally broadcast television program, "I think she either misled Congress and covered this up or she was totally incompetent. . . . [S]he should be removed because she's just not doing her job." [10]

Mr. Burton soon renewed his accusations of a cover-up, alleging that the Justice Department failed to provide Congress documents describing the FBI's use of pyrotechnic tear gas rounds. In particular, Mr. Burton accused the Justice Department of concealing from Congress the 49th page of an FBI lab report. This page, the last in the document, contained the following reference to the FBI's use of a military-style tear gas round: "Specimen Q1237 (B160) is a fired U.S. Military 40 mm shell casing which originally contained a CS gas round." [11] To a person with specialized knowledge of tear gas projectiles, this would indicate the use of a pyrotechnic projectile, capable of igniting a fire.

Mr. Burton charged that Justice Department officials, including the Attorney General of the United States, were involved in a cover-up. Mr. Burton wrote in a September 10, 1999, letter to Attorney General Reno:

> It is difficult for me to believe that the Department had multiple copies of a document, produced only one copy of the document to Congress, and then managed to lose the one critical page of the document mentioning the use of pyrotechnic tear gas. Had page 49 of the FBI report been produced to Congress when it was originally requested years ago, it would have cast doubt onto the testimony of a number of Department officials. The Department's failure to produce this document when it was originally requested raises more questions about whether this Committee was intentionally misled during the original Waco investigation.[12]

Over the following weekend, Mr. Burton repeated his accusation of a cover-up by the Attorney General, stating on one nationally broadcast television program, "that was the very definitive piece of paper that could have given us some information, it sure looks like they were withholding information. And she's responsible." [13]

Mr. Burton's allegations were not only unsupported by the evidence, they were directly contradicted by information in his own files.

In 1995, a subcommittee of the Government Reform and Oversight Committee and a subcommittee of the House Judiciary Committee conducted an investigation into the activities of Federal law enforcement agencies toward the Branch Davidians. As part of that inquiry, the subcommittees issued document requests to the White House and the Departments of Justice, Treasury, and Defense. The records produced in response to these requests were stored in over

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[9] "FBI Reverses Its Stand on Waco," Washington Post (Aug. 26, 1999).
[10] "Hannity & Colmes," Fox News (Aug. 30, 1999).
[11] Memorandum from FBI Laboratory to Sergeant James Miller, Texas Rangers (Dec. 6, 1993).
[12] Letter from Representative Dan Burton to Attorney General Janet Reno (Sept. 10, 1999).
[13] "Fox News Sunday," Fox News (Sept. 12, 1999).

40 boxes in congressional archives until August 1999, when they were recalled by Mr. Burton.

At the time Mr. Burton alleged that the Attorney General had withheld information on the use of military-style tear gas rounds, he had documents in his own possession that explicitly discuss the use of military-style tear gas rounds at Waco. Many of these documents were located by Representative Waxman's staff in boxes in Mr. Burton's offices within a few days of Mr. Burton's allegations.[14] One document provided to Congress in 1995, for example, was a report of an interview of the FBI agent who co-piloted the surveillance aircraft flying above the Branch Davidian compound on the morning of April 19, 1993. According to this document, the pilot reported hearing "a high volume of [Hostage Rescue Team] traffic and Sniper [Tactical Operations Center] instructions regarding . . . the insertion of gas by ground units," including "one conversation relative to utilization of some sort of military round to be used on a concrete bunker." [15]

Another document produced to Congress in 1995 was a typewritten chart prepared by Justice Department prosecutors in connection with the criminal trial of surviving Branch Davidians. The chart, which summarizes interviews with potential witnesses for the prosecution, identifies each Hostage Rescue Team member interviewed, the name of the interviewer, a summary of significant observations made by the witness, and whether each witness would be placed on the prosecution's witness list for trial. According to the chart, one witness, who was later identified as Special Agent Dave Corderman, was expected to testify that "smoke on film came from attempt to penetrate bunker w/1 military and 2 ferret rounds." [16] In addition, the document indicates that the witness described the appearance of the military round, stating: "Military was grey bubblehead w/green base." [17]

Also among the documents produced by the Justice Department to House investigators in 1995 were handwritten notes clearly describing the use of military rounds in the Waco operation and describing that such rounds were "incendiary." One set of notes read, "Smoke from bunker—came when these guys tried to shoot gas into the bunker. (Military gas round) . . . grey bubblehead w/green base." The term "military" or "military round" appears twice again in the same paragraph, and an arrow points from the word "military" to the word "incendiary." [18] Notes on the following page read, "Obj[ective]: to keep people from fleeing into bunker." [19]

Not only were there numerous references to the use of military tear gas at Waco in Mr. Burton's own files, but those files also contained the 49th page of the FBI lab report that Mr. Burton alleged had never been produced to Congress. After thoroughly investigating this issue, Senator Danforth found:

> Attorneys from the Department of Justice who produced documents to the United States House of Representatives

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[14] Letter from Representative Henry A. Waxman to Senator John C. Danforth (Sept. 13, 1999).
[15] Interview of Special Agent R. Wayne Smith, Federal Bureau of Investigation FD–302 (June 9, 1993).
[16] Unidentified handwritten notes.
[17] Id.
[18] Unidentified handwritten notes.
[19] Id.

> Committee on Government Reform and Oversight and the Committee on the Judiciary in advance of the 1995 hearings have come under public scrutiny for producing the FBI laboratory report containing the reference to the military tear gas round without the 49th page, which contains the relevant reference. *In fact, however, while one copy of the report did not contain the 49th page, the Committees were provided with at least two copies of the lab report in 1995 which did contain the 49th page. The Office of Special Counsel easily located these complete copies of the lab report at the Committees' offices when it reviewed the Committees' copy of the 1995 Department of Justice document production.* . . . The Special Counsel has concluded that the missing page on one copy of the lab report provided to the Committees is attributable to an innocent photocopying error and the Office of Special Counsel will not pursue the matter further.[20]

Mr. Burton has never apologized for making these unsubstantiated allegations of a government cover-up. To the contrary, in the majority's report, he renews the false accusation, suggesting that Justice Department and FBI officials deliberately delayed production of these documents to this committee in 1995 in order to conceal the truth.[21] The majority writes, "Sadly, the Justice Department did not produce the requested documents until three days before the start of the hearings."[22] In fact, however, the Justice Department received broad document requests 6 weeks before this committee held joint hearings with the Judiciary Committee in 1995 and, by agreement with the committee, produced 250,000 pages on a prioritized basis.[23] The Justice Department produced two complete copies of the FBI lab report to the committees on July 6, 1995.[24] The committees thus received the FBI lab report not 3 days ahead of the 1995 hearings, but 13 days before the start of the hearings, 26 days before the conclusion of the hearings, and 392 days before the committees issued their joint report on August 2, 1996.

III. Mr. Burton's Investigation Was Unnecessary and Wasteful

Since September 1999, the committee has conducted an unnecessary and wasteful investigation of Waco. Virtually every document the committee has obtained and virtually every witness interviewed by committee staff was examined by Senator Danforth in the course of his detailed Waco investigation.

A. SENATOR DANFORTH THOROUGHLY INVESTIGATED WACO

Despite a voluminous public record that had been developed on the Waco tragedy between 1993 and 1997, three developments oc-

[20] Danforth report at 54.
[21] See majority report at 30 n. 106, 31.
[22] Id. at 30 n. 106.
[23] See letter from Kent Marcus, Acting Assistant Attorney General for Legislative Affairs, to Chairman William H. Zeliff, Jr., and Chairman William McCollum (July 6, 1995).
[24] See id.; letter from Jon P. Jennings, Principal Deputy Assistant Attorney General, to Chairman Dan Burton (Oct. 22, 1999).

curring in August and September 1999 generated public interest in whether the government caused or contributed to the deaths of Branch Davidians at Waco and whether government officials had engaged in a cover-up. First, the FBI acknowledged on August 25, 2000, that it used a limited number of pyrotechnic tear gas projectiles on April 19, 1993.[25] Second, on September 2 and 3, 1999, the FBI released videotapes taken the morning of April 19, 1993, by an FBI surveillance aircraft using Forward Looking Infrared Radar (FLIR).[26] Prior to that time, the FBI and Justice Department had maintained that they only had FLIR tapes beginning later in the morning.[27] Third, news stories around the country reported that the Justice Department had evidence of the use of pyrotechnic tear gas rounds but failed to produce it to Congress in 1995.[28]

These developments caused a number of Republican leaders in the House and Senate to call for investigations, including Representative Henry Hyde, Representative Dan Burton, Senator Orrin Hatch, and Senator Arlen Specter.[29]

Attorney General Reno quickly responded to concerns raised by Members of Congress and by the media. On September 9, 1999, she appointed John Danforth, a highly respected former Republican U.S. Senator, as Special Counsel. As part of his mandate, Senator Danforth agreed to investigate five principal issues: (1) whether the government caused or contributed to the fire on April 19, 1993; (2) whether the government directed gunfire at the Branch Davidians on April 19, 1993; (3) whether the government used any incendiary or pyrotechnic device on April 19, 1993; (4) whether the government illegally employed the armed forces at Waco; and (5) whether government officials made false statements or concealed information about the events on April 19, 1993.[30] After receiving his appointment, Senator Danforth said that he planned to conduct an aggressive inquiry into whether there were "bad acts, not whether there was bad judgment."[31]

Attorney General Reno's appointment of Senator Danforth received wide praise. Republican Senator Fred Thompson said that Senator Danforth "has an excellent reputation and the highest integrity."[32] House Majority Leader Dick Armey questioned the need for any congressional hearings and expressed confidence in Senator Danforth, calling him "a man of impeccable integrity."[33] Mr. Bur-

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[25] "Branch Davidian Compound—Waco, Texas," press release, U.S. Department of Justice, Federal Bureau of Investigation (Aug. 25, 1999) (on line at http://www.fbi.gov/pressrm/pressrel/pressre199/presswaco2.htm).

[26] "FBI Releases Waco Videotape," press release, U.S. Department of Justice, Federal Bureau of Investigation (Sept. 2, 1999) (on line at http://www.fbi.gov/pressrm/pressrel/pressre199/wacorel.htm); "FBI Releases Second Waco Videotape," press release, U.S. Department of Justice, Federal Bureau of Investigation (Sept. 3, 1999) (on line at http://www.fbi.gov/pressrm/pressrel/pressrel199/wacorel2.htm).

[27] Danforth report at 141.

[28] E.g. "Burton Opens Investigation of Waco Tactics," CNN.com (Aug. 30, 1999) (on line at: http://www.cnn.com/allpolitics/stories/1999/08/30/tbi.waco); "FBI Suggests Outside Probe of Waco Siege," Washington Times (Sept. 1, 1999); "Marshals Acting on Reno's Orders Seize FBI Tape," New York Times (Sept. 2, 1999).

[29] "FBI Admits Using Tear Gas at Waco," Associated Press (Aug. 25, 1999).

[30] Danforth report at 2–3.

[31] "Aggressive Waco Probe Is Promised: Danforth Takes Over, Reno Recuses Herself," Washington Post, (Sept. 10, 1999).

[32] "Reno Picks Waco Head," Baltimore Sun (Sept. 9, 1999).

[33] "Armey Questions Need for New Hearings On Davidian Siege," Dallas Morning News (Oct. 8, 1999).

ton said, "He's a fine man, and I think Senator Danforth is going to do a commendable job."[34]

Senator Danforth proceeded to conduct a thorough and professional investigation of Waco. He hired over 70 staff to assist him in the investigation. As of July 2000, the Office of Special Counsel had interviewed 849 witnesses, reviewed over 2 million pages of documents, and examined thousands of pounds of physical evidence.[35]

Senator Danforth released an interim report on his investigation on July 21, 2000.[36] The report found, among other things, that government agents did not start or spread the fire that consumed the Branch Davidian compound, did not direct gunfire at the Branch Davidians, and did not unlawfully employ U.S. armed forces at Waco. The report was widely regarded as thorough and accurate. An editorial in the Washington Post called it "a welcome clarification of the record on this seemingly endless saga" and concluded that it was "time, finally, for Waco to recede into history."[37]

B. CHAIRMAN BURTON'S INVESTIGATION DUPLICATED THE DANFORTH INVESTIGATION

Despite the appointment of Senator Danforth as Special Counsel, Representative Burton persisted in conducting his own investigation. This investigation was substantial. It involved considerable staff resources, required Federal agencies to produce hundreds of thousands of pages of documents, resulted in extensive staff travel, and included many witness interviews. And in almost every respect, it duplicated the work of Senator Danforth and his staff.

As part of the investigation, Mr. Burton issued subpoenas to the Department of Justice, the FBI, the White House, and the Defense Department. Among the categories of documents required by committee subpoenas, Mr. Burton demanded all documents related to munitions issued to the Hostage Rescue Team; the various forms of tear gas used at Waco; all briefings given by the FBI during the siege; audio surveillance devices at Waco; contacts between the Department of Justice and the White House; contacts between the FBI and the Department of Defense; infrared imagery and analysis; the use of aircraft, helicopters, or armored vehicles; all photographs of the Branch Davidian compound; military involvement at Waco; military personnel at Waco; and "military personnel who provided advice or assistance of any sort" to the Justice Department, the FBI, or the White House.[38]

To comply with these subpoenas, Federal agencies have produced over 795,000 pages of documents. According to Attorney General Janet Reno:

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[34] "Hannity & Colmes," Fox News (Oct. 19, 1999).

[35] Danforth report at 4.

[36] Although Senator Danforth released his principal findings in his interim report, his investigation of certain issues is ongoing to date.

[37] "Waco: Case Closed," Washington Post (July 23, 2000).

[38] See subpoena duces tecum to Director Louis Freeh, Federal Bureau of Investigation (Sept. 1, 1999); subpoena duces tecum to Attorney General Janet Reno, U.S. Department of Justice (Sept. 1, 1999); subpoena duces tecum to the Executive Office of the President (Sept. 1, 1999); subpoena duces tecum to William S. Cohen, Secretary of Defense (Sept. 1, 1999); subpoena duces tecum to Federal Bureau of Investigation (Sept. 15, 1999); subpoena duces tecum to U.S. Department of Justice (Feb. 16, 2000).

> Just on Waco alone we provided 724,169 pages of documents, 12 looseleaf binders of FBI lab reports, 18 diskettes of documents, 101 videotapes, 729 audio tapes, 2,161 photographs, slides, charts, drawings, 8 CD ROMs of color photographs.[39]

This extensive document production was costly and redundant. According to representatives of the Justice Department, the FBI, and the Defense Department familiar with both investigations, the committee received few, if any, documents that were not also provided to Senator Danforth and his staff. In an October 19, 2000, letter to Representative Burton, Assistant Attorney General Robert Raben noted that the Justice Department had made over 80 separate productions of materials to the committee. He estimated that the cost of producing Waco-related materials to this committee and other congressional committees exceeded $800,000.[40]

The committee's witness interviews were also duplicative of Senator Danforth's efforts. Despite the ongoing efforts of Senator Danforth, this committee conducted more than 80 interviews of government employees and private citizens with knowledge on various aspects of the Waco standoff. The majority conducted 77 interviews jointly with the minority staff. Five witnesses appeared for interview twice before the minority and majority staff. Two other known witnesses were interviewed outside the presence of minority staff. Most of these interviews lasted 2 or more hours and required the subject of the interview to leave work and appear at the committee's offices. On several occasions, committee staff traveled to conduct interviews outside the District of Columbia, including trips to Florida, New York, North Carolina, Pennsylvania, Puerto Rico, and Texas.

In a September 22, 2000, letter, Representative Waxman provided a list of joint interviews to Senator Danforth and asked how many witnesses interviewed by the committee had been interviewed by the Office of Special Counsel.[41] Senator Danforth responded on September 26, 2000, and identified only six individuals who were not interviewed by the Office of Special Counsel.[42] These six individuals provided no significant information that is not addressed in Senator Danforth's report.[43]

III. The Investigation Contributed Virtually Nothing to the Public's Understanding of the Waco Tragedy

Although the majority report spans 100 pages and includes approximately 1,390 pages of exhibits, it contributes virtually nothing to the public's understanding of Waco. To the extent that the ma-

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[39] Interview of Attorney General Reno at 29 (Oct. 5, 2000). By October 19, the number of documents the Justice Department had produced increased to 730,000. Letter from Robert Raben, Assistant Attorney General for Legislative Affairs, to Chairman Dan Burton (Oct. 19, 2000).

[40] Letter from Robert Raben, Assistant Attorney General for Legislative Affairs, to Chairman Dan Burton (Oct. 19, 2000).

[41] Letter from Representative Henry Waxman to Senator John Danforth (Sept. 22, 2000).

[42] These individuals were David Binney, Gregory Johnson, James Lockner, David Margolis, Peter Proach, and Rod Rosenstein.

[43] The six witnesses provided information about the adequacy of the Justice Department's internal investigation and the provision of military assistance at Waco. Both subjects were extensively discussed by Senator Danforth. See Danforth report at 51–52, 29–41.

jority's conclusions differ from those of the Office of Special Counsel, they consist largely of unsupported allegations of wrongdoing.

A. THE MAJORITY REPORT REPEATS MANY OF THE CONCLUSIONS OF SENATOR DANFORTH

Many of the majority report's findings mimic those of Senator Danforth's report. The Office of Special Counsel concluded that government agents did not direct gunfire at the Branch Davidian compound;[44] that a Hostage Rescue Team (HRT) member fired three pyrotechnic tear gas rounds on April 19, 1993, but those rounds had nothing to do with the fire that consumed the compound;[45] that certain government attorneys and the former commander of the HRT had reason to know about the use of pyrotechnic tear gas rounds on April 19, 1993, but failed to correct an inaccurate public record;[46] that the Justice Department's internal review failed adequately to investigate evidence that pyrotechnic rounds had been fired on April 19, 1993;[47] and that the government did not improperly or unlawfully employ the U.S. military as part of its law enforcement operation at Waco.[48]

All these findings are echoed in the majority report. This committee's recitation of similar facts and conclusions does not make a meaningful contribution to the public record.

B. THE MAJORITY REPORT MAKES UNSUBSTANTIATED ALLEGATIONS OF WRONGDOING

The majority report departs from Senator Danforth's report primarily in its conclusions that Attorney General Reno and certain current and former Justice Department employees engaged in wrongdoing. But, as is discussed below, these conclusions are nothing more than unsupported allegations.

1. Allegations Involving Attorney General Reno

In its report, the majority makes several unsubstantiated allegations regarding the Attorney General. The majority concludes that Attorney General Reno was uninterested in learning or disclosing the true facts about Waco, that she "reversed" her decision disapproving of the FBI's tear gas plan without any basis, and that she misrepresented that the military approved or endorsed the FBI's tear gas plan. These allegations are unsupported by the facts and have no merit.

a. Allegation That the Attorney General Was Not Interested in Disclosing the Truth about Waco

The majority unfairly concludes that the Attorney General and the Justice Department had no interest in learning or disclosing the facts surrounding Waco. The majority writes that "[a]ll of the actions taken by the Justice Department were consistent with an

[44] Id. at 4.
[45] Id. at 4–5.
[46] Id. at 47, 52–53, 56.
[47] Id. at 52.
[48] Id. at 29.

organization that was not eager to learn the full truth about what happened on April 19, 1993."[49] The majority also states:

> It is troubling that the Waco tragedy did not seem to merit a "vigorous and thorough investigation." President Clinton called for such an inquiry. Attorney General Reno promised such an inquiry would take place. Neither took the steps necessary to make sure it would happen again.[50]

In fact, the Attorney General tried hard to investigate the events at Waco. After the Waco fire on April 19, 1993, Attorney General Reno directed her assistant Richard Scruggs, a career Federal prosecutor, to begin an investigation to find out what happened in order to avoid a similar tragedy in the future. According to Mr. Scruggs, the Attorney General did not limit the scope of the inquiry in any way.[51] Moreover, Mr. Scruggs received significant Justice Department resources in conducting this investigation. Mr. Scruggs was assisted by senior Justice Department attorneys and the Assistant Director of the FBI's Inspection Division. According to Mr. Scruggs, the Inspection Division made use of an army of FBI agents from several offices around the country.[52]

In addition, Attorney General Reno asked a distinguished outside attorney, Edward Dennis, Jr., to conduct an independent evaluation of the Justice Department's and FBI's conduct at Waco.[53] Mr. Dennis had served in several senior Justice Department positions, including Acting Deputy Attorney General and Assistant Attorney General for the Criminal Division during the Bush administration, and, during the Reagan administration, U.S. Attorney for the Eastern District of Pennsylvania.[54]

It is true that there were deficiencies in these investigations. For example, the investigations should have discovered and disclosed the FBI's use of pyrotechnic tear gas rounds and indicated that the pyrotechnic tear gas rounds did not contribute to the fire in the Branch Davidian compound. But these deficiencies cannot be fairly attributed to the Attorney General. The Attorney General was not involved in the details of either investigation. In fact, Mr. Scruggs, who was primarily responsible for developing the factual record, made a conscious decision not to report to the Attorney General because she was a fact witness.[55]

Senator Danforth specifically addressed whether the Attorney General made knowing misstatements about the use of pyrotechnic tear gas rounds and whether she took adequate steps to determine the true facts. He concluded that Attorney General Reno was without fault and that she made diligent efforts to learn the truth. In his report, he writes:

> The Office of Special Counsel has concluded that Attorney General Reno did not knowingly cover up the use of pyro-

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[49] Majority report at 6.
[50] Id. at 27.
[51] Interview of Richard Scruggs (Jan. 5, 2000).
[52] Id.
[53] See Edward S.G. Dennis, Jr., "Evaluation of the Handling of the Branch Davidian Stand-Off in Waco, Texas By the United States Department of Justice and the Federal Bureau of Investigation" (Sept. 24, 1993); interview of Edward S.G. Dennis, Jr. (Jan. 14, 2000).
[54] Interview of Edward S.G. Dennis, Jr. (Jan. 14, 2000).
[55] Interview of Richard Scruggs (Jan. 5, 2000).

> technic tear gas rounds by the FBI. The evidence is overwhelming that, prior to the execution of the gassing plan, she sought and received assurances from the FBI that it would not use pyrotechnic tear gas rounds. The evidence is equally conclusive that the briefing materials and other information she received after the fact stated that the FBI had not used pyrotechnic tear gas rounds at Waco. *Any misstatement that she made was inadvertent and occurred after diligent efforts on her part to learn the truth.* The Office of Special Counsel has completed its investigation of Attorney General Reno, [and] found her to be without direct fault for any false statements that she may have made.[56]

Attorney General Reno first learned about the use of pyrotechnic tear gas rounds in August 1999. She reacted with surprise and anger to the revelation and acted quickly to determine the facts.[57] By September 9, she had completed a search for an impartial outside investigator and appointed John Danforth, a respected Republican former Senator, as Special Counsel. As is detailed in the Danforth report, the Attorney General gave Senator Danforth extensive resources and prosecutorial power to determine the truth.[58]

b. Allegation that the Attorney General Failed to Disclose Her Reasons for Approving the FBI's Tear Gas Plan

As part of the efforts to end the siege at Waco, the Attorney General approved an FBI plan to insert tear gas into the Branch Davidian compound after initially withholding her approval of the use of tear gas.[59] In another unsubstantiated allegation, the majority asserts that the Attorney General has failed to disclose her reasons for "reversing" herself and allowing the use of the tear gas. The majority states that her purported failure to explain her actions is inconsistent with President Clinton's directive to make all of the facts public.[60]

In fact, however, Attorney General Reno has explained on numerous occasions why she decided to approve the FBI's plan to use tear gas.[61] Indeed, the Attorney General has explained her decision at least twice to members of this committee.[62] As recently as Octo-

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[56] Danforth report at 51.

[57] See, e.g, "Waco's New Question: Who Knew? Two Days After Blaze, Information on Grenades Was Withheld or Overlooked," Washington Post (Sept. 3, 1999).

[58] See Danforth report at 2–3.

[59] The tear gas approved by the Attorney General and used inside the Branch Davidian residence was not delivered by means of a pyrotechnic projectile. Rather, the tear gas used in the residence was sprayed from the nozzle of Model V Projecto-Jet canisters installed on combat engineering vehicles or fired from M–79 grenade launchers in "ferret rounds." Ferret rounds disperse the CS gas on impact, without using a pyrotechnic mixture. See interview of Monty Jett (Feb. 1, 2000).

[60] Majority report at 47.

[61] E.g. "Press Conference on Branch Davidian April 19, 1993 Crisis" (Apr. 19, 1993) (Bates Stamp No. CNG 3691272–300); House Committee on the Judiciary, "Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas," 103d Cong., 21–39, 48–51, 80–82 (Apr. 28, 1993); interview of Attorney General Janet Reno, Federal Bureau of Investigation FD–302 (Aug. 2, 1993); deposition of Attorney General Janet Reno, *Andrade* v. *Chojnacki,* No. H–94–0923, 89–96 (W.D. Tex).

[62] See House Committee on Government Reform and Oversight and House Committee on the Judiciary, hearings on "Activities of Federal Law Enforcement Agencies Toward the Branch Davidians," 104th Cong., vol. 3, 371–72 (Aug. 1, 1995) (hereinafter "joint hearings"); interview of Attorney General Janet Reno at 78–83.

ber 5, 2000, Attorney General Reno repeated to committee members why she decided to approve the FBI's plan. She said:

> We were faced with a dangerous situation that was becoming more dangerous . . . Branch Davidians who had killed four Federal agents had refused to yield to lawful authority for 51 days. The Branch Davidians held children in conditions that were clearly unhealthful and deteriorating. I had reviewed the gas plan carefully and received the advice of the experts that the gas, although uncomfortable, would cause no lasting harmful effects for children or adults. Koresh's repeated failures to abide by his promises led the negotiators, and ultimately me, to conclude that he would not come out. This conclusion was buttressed by the fact that none of the occupants had come out since March 21st and the fact that the Davidians had food and water sufficient to last at least a year. I think this was one of the deciding factors. The HRT was in immediate need of retraining. This need for retraining was so severe that it did not appear that they could continue to control the perimeter for significant time. They then, that day that I gave the authority to go forward, said that . . . the threat of cataclysmic end was there. He had talked about Armageddon, and the conclusion of the FBI was that he could do it at any time, with or without us, . . . and that they were in the best position to control it at this point that they would be [in] for some foreseeable future.[63]

Despite the mystery that the majority attempts to ascribe to the Attorney General's decisionmaking process, it appears that she decided to approve the plan after senior FBI officials persuaded her that the chances for a successful resolution would only diminish with the passage of time.[64] The facts recited by Senator Danforth support this conclusion. He writes:

> After further considering the issue, Attorney General Reno changed her mind. She indicated that she was inclined to approve the plan, but wanted to see an even more detailed discussion of the plan and substantial supporting documentation setting out the conditions inside the complex, the status of negotiations, and the reasoning behind the plan. According to Attorney General Reno, she ultimately changed her mind because she was convinced that the Davidians would not come out voluntarily. She felt that the FBI would eventually have to go forward with some plan, and that it was better to proceed when the FBI was ready and best able to control the situation.[65]

c. Allegation That the Attorney General and President Clinton Deceived the American Public by Representing That the Military Endorsed the FBI's Tear Gas Plan

In another unsupported allegation, the majority writes that "President Clinton and Attorney General Reno have deceived the

[63] Interview of Attorney General Reno at 81–82 (Oct. 5, 2000).
[64] Joint hearings at 372.
[65] Danforth report at 108.

American people for over seven years by misrepresenting that the military endorsed, sanctioned or otherwise approvingly evaluated the [FBI's tear gas] plan."[66] According to the majority, the Attorney General's and President Clinton's statements about the military's opinions stand in "stark contrast" to the recollections of two senior Army officers.[67]

The "stark" differences cited by the majority are largely semantic, however. They reflect a range of subjective impressions of the same meeting. The statements made by the Attorney General are consistent with those of at least three other civilian participants at the meeting and do not differ in any significant factual detail from the recollections of the military officers involved.

After the FBI had proposed the use of tear gas to end the standoff, FBI Director Sessions convened a meeting on April 14, 1993, to address Attorney General Reno's concerns. Among others present were two senior Army officers, who were asked a number of questions about the proposed plan.[68] In statements made after Waco, the Attorney General recalled that the Army officers present at the meeting had viewed the FBI's plan as "excellent" or "sound."[69] In her October 5, 2000, interview, the Attorney General reiterated:

> The military representatives stated the plan to introduce tear gas into the compound was reasonable and practical. . . . My sense was that they thought it was a reasonable and practical plan, but they couldn't be the judge and nobody was asking them to be the judge of a law enforcement initiative where rules of engagement would apply that would be different than the military.[70]

President Clinton also made similar comments, stating:

> And so I asked if the military had been consulted. The Attorney General said that they had, and that they were in basic agreement that there was only one minor tactical difference of opinion between the FBI and the military—something both sides thought was not of overwhelming significance.[71]

These statements are entirely consistent with the recollections of others who attended the same meeting on April 14, 1993. For example, Mary Incontro, a career Justice Department prosecutor, told the FBI in 1993:

> [The Army unit commander] outlined his views of the plan and an overall assessment of the plan appeared to be that it had been carefully and wisely reviewed. The military personnel advised that although the plan utilizing a specialized gas was not similar to any type of military attack, it appeared to be carefully constructed and the highest de-

[66] Majority report at 6–7.
[67] Id. at 81.
[68] Danforth report at 105.
[69] "60 Minutes" (May 12, 1995); House Committee on the Judiciary, "Events Surrounding the Branch Davidian Cult Standoff in Waco, Texas," 103d Cong., 15–16 (Apr. 28, 1993).
[70] Interview of Attorney General Janet Reno at 79, 80 (Oct. 5, 2000).
[71] Majority report at 76 (quoting remarks by President Clinton on Apr. 20, 1993).

> gree of confidence was given to the Hostage Rescue Team.[72]

Ms. Incontro confirmed this recollection to committee staff on April 14, 2000. She said that the senior Army officers at the meeting viewed the plan as militarily sound and well conceived. She said that while the military representatives may have said that the military would do it differently, she heard no dissent from the military representatives.[73]

A second individual present at the April 14, 1993, meeting gave an account that is also similar to the account given by Attorney General Reno. Jack Keeney, who was acting Assistant Attorney General for the Criminal Division in 1993, told committee staff that the military officers present at the meeting said they would do the plan differently if it were a military operation, but the two military officers seemed generally to endorse the FBI plan.[74]

A third Justice Department official had a similar impression that the military officers present at the April 14 meeting had given a positive review of the proposed plan. According to the FBI's record of the interview of Webster Hubbell, then Associate Attorney General, Mr. Hubbell said:

> The military representatives stated that the FBI plan to introduce tear gas into the compound was reasonable and practical. The only aspect of the plan that the military would do differently concerned the timing of the gas insertion. . . . Hubbell recalls the military representatives indicated they believed the FBI plan as presented would work and that after the gas was inserted people in the [Branch Davidian Compound] would come out.[75]

The majority's allegation that the Attorney General and the President misrepresented the military's role is based on the majority's interpretation of the comments of the two senior Army officers who attended the April 14 meeting. It is true that both recall that they never expressed support for or endorsed the proposed tear gas plan.[76] But the underlying facts described by these Army officers closely resemble the accounts given by Attorney General Reno, Ms. Incontro, Mr. Keeney, and Mr. Hubbell.

In a 1993 memorandum written to his commander, one of the military participants described the meeting. He wrote that he and the other senior Army officer told the group that the proposed FBI operation was not and could not be assessed as a military operation.[77] In the same memorandum, he further stated:

> The plan which was executed at Waco was an FBI plan which neither [Army officers] helped prepare. *At the same time, I did believe that they had a reasonable chance of ac-*

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[72] Interview of Mary Incontro, Deputy Chief, Terrorism and Violent Crimes Section, Criminal Division, U.S. Department of Justice, Federal Bureau of Investigation FD–302 (July 22, 1993).

[73] Interview of Mary Incontro, Assistant U.S. Attorney (Apr. 14, 2000).

[74] Interview of Jack Keeney, Principal Deputy Assistant Attorney General, Criminal Division, U.S. Department of Justice (Apr. 26, 2000).

[75] Interview of Webster Hubbell, Associate Attorney General, Federal Bureau of Investigation FD–302 (Aug. 3, 1993).

[76] Interview of General Peter Schoomaker, Commander in Chief, U.S. Special Operations Command (Jan. 13, 2000); interview of Special Operations General Officer No. 1 (Jan. 13, 2000).

[77] Memorandum from Army Colonel to Commander, U.S. Army Special Operations Command (May 13, 1993).

> *complishing their objective of forcing the occupants out of the building.* Their approach was substantially different than anything that I have encountered. . . . I did not believe that the FBI and the Attorney General were trying to force us to support or defend the plan. It was my belief that they simply wanted any observations that we felt comfortable providing.[78]

In short, the majority grossly exaggerates the significance of what is largely a difference in semantics and subjective impressions. Attorney General Reno's impressions of the April 14 meeting were shared by at least three others who attended the same meeting. The majority's assertion that she or President Clinton deceived the American public is without any merit.

2. Allegations Regarding the Internal Justice Department Review

The majority criticizes as negligent the internal Justice Department investigation led by Richard Scruggs.[79] Mr. Scruggs was the leader of a team of Justice Department attorneys and FBI inspectors who conducted approximately 950 interviews in the aftermath of Waco and drafted a 368-page report to the Deputy Attorney General.[80] The primary basis for the majority's criticism is that the Justice Department investigation did not discuss the use of pyrotechnic tear gas rounds at Waco.

In hindsight, it is clear that the Justice Department investigation should have disclosed the use of the pyrotechnic tear gas rounds, as well as the fact that the use of these rounds did not contribute to the fatal fire at the Branch Davidian compound. But there is an irony in the majority's criticism. The majority writes:

> Had Scruggs and his colleagues thoroughly reviewed all the documents available to them, they would have found references to "military" rounds. Scruggs and his colleagues failed to do so. The failure of the Scruggs team to come to an understanding that pyrotechnic rounds were used was, as discovered in 1999, a significant shortcoming.[81]

As was discussed in part II above, the majority had access to these very same documents for 5 years. Thus, the "significant shortcoming" attributed to the Justice Department's investigation also applies to the majority's own investigation. The fact is, like almost everyone else involved in Waco-related investigations, lawsuits, and criminal proceedings, the majority failed to notice the significance of the documents referring to the use of "military" rounds. Indeed, as noted above, the majority did not even know that their own files contained the documents referring to these rounds until Representative Waxman pointed this out in a September 13, 1999, letter.[82]

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[78] Id.

[79] Id. at 57.

[80] Richard Scruggs, "Report to the Deputy Attorney General on the Events at Waco, Texas," Feb. 28–Apr. 19, 1993, 14 (Oct. 8, 1993) (unredacted version) (hereinafter "Scruggs report").

[81] Majority report at 60.

[82] The majority attempts to explain its failure to recognize the significance of these documents by suggesting the Justice Department intentionally delayed giving the committee the key documents 3 days before the start of hearings in 1995. The majority has pointed to no evidence, how-

Continued

The majority also makes the assertion that "[p]ressure from senior Justice Department officials, including then-Deputy Attorney General Phil Heymann, caused the Scruggs team to rush to conclude their investigation and to publish their report, thus failing to uncover and disclose facts."[83] According to the majority, "the Scruggs investigation . . . was improperly rushed to its conclusion solely for political purposes."[84]

The record of this investigation, however, contains no support for these assertions of political pressure. Committee staff interviewed Mr. Heymann on July 19, 2000. Mr. Heymann said that he wanted the review completed within 6 months to prevent the review from becoming a never-ending investigation, a familiar phenomenon in law enforcement. He said that no one complained to him that the investigation was incomplete or inadequate.[85] Not a single witness interviewed by the committee suggested that the Justice Department's investigation was cut short for political purposes. Senator Danforth, who was critical of aspects of the Department's investigation in his interim report, did not find any evidence of pressure to complete the investigation.

3. Unsubstantiated Allegations Against Marie Hagen

The majority accuses Marie Hagen, a Justice Department trial attorney, of reckless conduct and concludes that if she had "followed up" on a certain request for information to an FBI attorney, "the time consuming investigations started in 1999 would not have been necessary."[86] But these conclusions are unsupported by any documentary evidence, including the documents cited by the majority, and they directly conflict with the findings of Senator Danforth. The evidence gathered by this committee and Senator Danforth shows that Ms. Hagen took diligent steps to determine the truth and is in no way responsible for this committee's Waco investigation.

Ms. Hagen was a trial attorney working on *Andrade* v. *United States,* a consolidated lawsuit brought by seven groups of Branch Davidians and relatives of deceased Branch Davidians. The plaintiffs in that case alleged that government agents used excessive force, failed to provide adequate emergency services, and intentionally or negligently committed other acts that harmed the Branch Davidians in 1993.[87] In 1996, the plaintiffs in that lawsuit filed the declaration of their fire expert, Richard Sherrow (Sherrow declaration). The Sherrow declaration alluded to documents the plaintiffs had obtained from the FBI prior to January 1996, which indicated that the FBI had fired at least one military pyrotechnic munition into the Branch Davidian complex.[88]

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ever, that supports its assertion that the Justice Department deliberately delayed production of documents to this committee. For example, as is discussed in part II above, the Justice Department provided the committee an FBI lab report mentioning the use of military tear gas rounds 13 days before the start of joint committee hearings in 1995, 26 days before the conclusions of those hearings, and 392 days before the committees issued their joint report.

[83] Majority report at 6.

[84] Id. at 5.

[85] Interview of Philip Heymann, professor of law, Harvard University Law School (July 19, 2000).

[86] Majority report at 56–57.

[87] See Danforth report at 142.

[88] Declaration of Richard L. Sherrow at 6, *Andrade* v. *Chojnacki,* No. H–94–0923 (S.D. Tex.) (Jan. 17, 1996) (majority exhibit 47).

According to the Office of Special Counsel, Ms. Hagen took several affirmative steps to determine the basis for Mr. Sherrow's mention of military pyrotechnic munitions. In January 1996, Ms. Hagen asked an FBI attorney, Jacqueline Brown, for help in responding to the Sherrow declaration.[89] She also forwarded a relevant pleading to Ms. Brown for review before filing it with the court.[90] She took these steps even though numerous Justice Department and FBI officials had, by that time, concluded that the FBI had used no pyrotechnic munitions at Waco.[91]

According to the Office of Special Counsel, Ms. Brown faxed the Sherrow declaration to an FBI chemical agent specialist. Someone (possibly Ms. Brown) also faxed the document to Supervisory Special Agent Robert Hickey, a member of the Hostage Rescue Team. On February 15, 1996, Mr. Hickey drafted an internal FBI memorandum (Hickey memorandum) that responded in detail to the Sherrow declaration. Mr. Hickey clearly acknowledged the harmless use of military rounds on April 19, 1993, and wrote, in pertinent part:

> Shortly after the operation commenced on 4/19/93, the HRT (Charlie Team) determined, after two (2) or three (3) ferret rounds, that they were unable to penetrate the underground shelter roof which was their first target. Charlie Team then requested to use 40mm military CS rounds in an effort to penetrate the roof. Charlie Team was granted authority to fire the military CS rounds. A total of two (2) or three (3) rounds were fired at the underground shelter roof. These rounds hit the roof, bounced off and landed in the open field well behind the main structure. This occurred shortly after 6:00 am. These were the only military rounds utilized.[92]

According to the Office of Special Counsel, Mr. Hickey faxed his memorandum to Ms. Brown on February 16, 1996, and discussed it with her the same day. Ms. Brown made notations on the section of the memorandum relating to the use of military rounds.[93]

The majority's charges against Ms. Hagen hinge on whether Ms. Brown informed Ms. Hagen about the Hickey memorandum. The majority asserts that Ms. Hagen was informed by Ms. Brown about the use of the military rounds. The Office of Special Counsel, however, specifically concluded that she was not informed.[94]

The evidence supporting the majority's view is scant. Ms. Brown maintains that she provided information on the FBI's use of military rounds to her supervisor and Ms. Hagen.[95] But apart from Ms. Brown's assertion that she provided the Hickey memorandum to

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[89] Danforth report at 56.
[90] Id. at 57.
[91] Senator Danforth recites a list of statements by various Justice Department and FBI officials indicating that no pyrotechnic munitions were used at Waco. These include statements by FBI Special Agent in Charge Robert Ricks, Attorney General Janet Reno, FBI Director William Sessions, and the Scruggs report. Danforth report at 46–47. Ms. Hagen had no reason to know at the time that these reports had overlooked evidence indicating the use of military rounds on Apr. 19, 1993.
[92] Memorandum from Robert Hickey, Supervisory Special Agent, Federal Bureau of Investigation, to Jacqueline F. Brown, Office of General Counsel (Feb. 15, 1996).
[93] Danforth report at 57.
[94] Id. at 57–58.
[95] Id. at 57.

Ms. Hagen, the committee has no documentary or other evidence that Ms. Brown provided the Hickey memorandum to Ms. Hagen.

The majority asserts in its report:

> Documents made available to Committee staff indicate that Brown did in fact share the Hickey memorandum with her supervisor, Virginia Buckles, and Hagen. For example, Brown, who maintained a daily checklist of action items, recorded on February 19, 1996, the fact that she spoke with Hagen and other Justice Department officials regarding the Hickey memorandum and showed them the document: "meet w/DOJ re dec[laration] memo to M[arie] H[agen]."[96]

This is simply incorrect. Ms. Brown's daily to-do list does not read, "meet w/DOJ re dec[laration] memo to M[arie] H[agen]," as the majority contends. It actually contains three relevant entries, which, if anything, suggest that Ms. Brown did not provide the Hickey memorandum to Ms. Hagen. One entry reads, "Waco-gas memo." Another reads "Meet w/ DOJ re dec (ask to review final copy of reply)." And another reads "Sherrow Dec memo to MH." Of those three entries, the only one checked off and presumably completed is the second: "Meet w/ DOJ re dec (ask to review final copy of reply)."[97] The Sherrow declaration was 22 pages long and raised a number of possible fact issues relating to the cause of the fire.

Senator Danforth and his staff read precisely the opposite meaning from this document as does the majority. And they arrive at the opposite conclusion about Ms. Hagen. The Danforth report states:

> [T]he documentary evidence also indicates that Brown did not give the information to Hagen. As stated above, neither Brown nor the Office of Special Counsel was able to locate a fax cover sheet indicating that she had faxed the Hickey memo to Hagen. Hagen's files contain no copy of the Hickey memo. In addition, Brown's "To Do" list in her calendar for February 19, 1996, contains the notation, "Sherrow Declaration Memo to M[arie] H[agen]." Unlike some diary entries, this "To Do" item is not checked off. Moreover, Brown placed a number on the Hickey memorandum which would result in its being placed in an FBI litigation file that would not be disclosed to the Department of Justice.[98]

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[96] Majority report at 55.

[97] Calendar of Jacqueline Brown, Assistant General Counsel, Federal Bureau of Investigation (Feb. 19, 1996).

[98] Danforth report at 59. In addition to this journal entry, the majority distorts the meaning of two other documents in an effort to show that Ms. Brown provided information on the Hickey memorandum to Ms. Hagen. Referring to Virginia Buckles, Ms. Brown's supervisor, the majority writes in its report: "Buckles' own memoranda to then-FBI General Counsel Howard Shapiro detailing the status of then-ongoing FBI civil litigation referenced Buckles' and Brown's involvement in assisting Hagen and the Justice Department to clarify the Sherrow Declaration." Although these memoranda mention the Sherrow declaration, they address elements of the declaration that have nothing to do with its reference to military tear gas rounds. One memorandum relates to a claim that a combat engineering vehicle caused the fire after it tipped over a lantern and a claim that the FBI violated its own internal regulations. The second memorandum relates to Mr. Sherrow's analysis of "hot spots" on the FLIR video. While these documents tend to show that Ms. Brown assisted in the preparation of the Justice Department's reply brief, they give no insight into whether Ms. Brown provided information on the Hickey memorandum to Ms. Hagen.

4. Allegations Regarding the Posse Comitatus Act

The majority alleges that White House officials and senior law enforcement officials sought advice from senior military officers that, if given, would have violated the Posse Comitatus Act.[99] Although the majority recites the history of the act and the enactment of related statutes, it provides no support for its conclusion. To the contrary, the relevant statute and its legislative history suggest the opposite conclusion.

The Posse Comitatus Act prohibits the use of Army and Air Force personnel to execute the civil laws of the United States, except under circumstances prescribed by Congress.[100] The act has generally been interpreted to permit military support of law enforcement short of actual search, seizure, arrest or similar confrontation with civilians.[101]

In 1981, Congress enacted chapter 18 of title 10 of the United States Code to clarify the law on permissible forms of military assistance to civilian law enforcement agencies.[102] Among other things, this statute expressly authorizes the Secretary of Defense to make military personnel available to provide "law enforcement officials with expert advice relevant to the purposes of this chapter," subject to the limitation that the Secretary of Defense prevent "direct participation by a member of the Army, Navy, Air Force, or Marine Corps in a search, seizure, arrest, or other similar activity."[103]

The majority apparently takes the view that the advice sought by Justice Department and FBI officials is outside the scope of permissible expert advice and constitutes prohibited direct participation in an arrest. The majority, however, offers no legal support for this conclusion, which runs contrary to the legislative history of the applicable law. J. Michael Luttig, an Assistant Attorney General during the Bush administration, explained:

> It is evident from the legislative history of these amendments that Congress intended to codify the distinction—articulated by the district court in United States v. Red Feather—between "indirect passive" assistance and "direct active" involvement in law enforcement activity. . . . Significantly, Congress understood Red Feather to prohibit only activity that entailed direct, physical confrontation between military personnel and civilians.[104]

The input sought from the military personnel at the April 14, 1993, meeting related to their area of professional expertise. The law expressly authorizes such provision of military expert advice to civilian law enforcement. In addition, Justice Department and FBI officials sought this expert advice during the formative stages of a law enforcement plan. This would not constitute the direct, active

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[99] Majority report at 61 n. 225, 61; 18 U.S.C. § 1385.

[100] 18 U.S.C. § 1385; see generally U.S. Army Judge Advocate General School, "Operational Law Handbook," 22–1 (1996) (hereinafter "operational law handbook").

[101] Operational law handbook at 22–1.

[102] See generally 1 Op. Off. Legal Counsel 36, 1991 WL 49985 (Feb. 19, 1991) (concluding that Congress intended only to prevent searches likely to result in a direct confrontation between military personnel and civilians).

[103] 10 U.S.C. §§ 373, 375.

[104] 15 Op. Off. Legal Counsel at 42.

use of the military to execute the law. It thus would not have violated the Posse Comitatus Act or any other applicable statute.

Senator Danforth thoroughly investigated the role of the military at Waco. He found that there was no violation of the Posse Comitatus Act and no other illegal or improper use of the armed forces. Senator Danforth wrote that the two senior Army officers present at the April 14, 1993 meeting:

> discussed the effects of CS gas on people, whether the delivery of tear gas could start of fire, whether the HRT personnel were fatigued or in need of retraining, and they described how the military would conduct the operation. They emphasized the differences between military and civilian law enforcement operations. This advice was within the areas of their expertise and did not constitute direct participation in law enforcement activity.[105]

IV. CONCLUSION

The committee's 13-month investigation of Waco was unnecessary, expensive, and fruitless. Although the majority report spans 100 pages and includes nearly 1,400 pages of documentary exhibits, it contributes virtually nothing to the public's understanding of Waco. Many of the report's findings duplicate those of the Special Counsel, former Senator John C. Danforth. In his report, Senator Danforth determined, among other things, that government agents did not cause or contribute to the fire that consumed the Branch Davidian compound on April 19, 1993, did not direct gunfire at the Branch Davidians on April 19, and did not unlawfully employ U.S. armed forces at any time during the standoff. To the extent the majority report deviates from Senator Danforth's findings, it consists largely of unsupported allegations of wrongdoing by the Attorney General and Justice Department officials.

HON. HENRY A. WAXMAN.
HON. TOM LANTOS.
HON. MAJOR R. OWENS.
HON. EDOLPHUS TOWNS.
HON. PAUL E. KANJORSKI.
HON. CAROLYN B. MALONEY.
HON. ELEANOR HOLMES NORTON.
HON. CHAKA FATTAH.
HON. ELIJAH E. CUMMINGS.
HON. DENNIS J. KUCINICH.
HON. ROD R. BLAGOJEVICH.
HON. DANNY K. DAVIS.
HON. JOHN F. TIERNEY.
HON. JIM TURNER.
HON. HAROLD E. FORD, JR.

[The exhibits referred to follow:]

[105] Danforth report at 37.

EXHIBIT 1

ONE HUNDRED SIXTH CONGRESS

Congress of the United States

House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

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September 13, 1999

The Honorable John C. Danforth
Special Counsel
Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Senator Danforth:

When you were appointed special counsel to investigate Waco, you stated that you will focus on "whether there were bad acts" committed by the Department of Justice or the FBI, such as covering up evidence that pyrotechnic rounds of tear gas were used by the FBI at Waco. I have obtained documents that appear relevant to your inquiry into these issues.

The events at Waco reemerged as a national story on August 26, 1999, based on reports that "military rounds" of tear gas, which may have some potential to ignite a fire, were used during the law enforcement operation at Waco on April 19, 1993. These reports have led Republican leaders in Congress to accuse the Attorney General of a cover-up. For example, Rep. Dan Burton, the Chairman of the Government Reform Committee, has stated that Attorney General Janet Reno "should be summarily removed, either because she's incompetent, number one, or, number two, she's blocking for the President and covering things up, which is what I believe."[1]

These accusations of a cover-up have been fueled by a front-page story in the *Washington Post* that the Department of Justice did not transmit to Congress the 49th page of an FBI lab report, which contained a reference to the use of "a fired U.S. military 40 mm shell casing which originally contained a CS tear gas round."[2] Responding to this report, Chairman Burton stated on national television: "it sure looks like they were withholding information, and she's responsible."[3]

My staff has begun to examine whether evidence about the use of military tear gas rounds

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[1] NPR's Morning Edition (Aug. 31, 1999).

[2] "Hill Got Incomplete Report on Waco Gas," Washington Post (Sept. 11, 1999).

[3] Fox News Sunday (Sept. 12, 1999).

was, in fact, withheld from Congress during Congress' 1995 investigation into Waco. Although this staff investigation is still on-going, the minority staff has already found several documents that were provided by the Justice Department to Congress in 1995 that explicitly describe the use of military tear gas rounds at Waco on April 19, 1993.

One document provided to Congress in 1995, for example, was a report of an interview of the FBI agent who co-piloted the surveillance aircraft flying above the Branch Davidian compound on the morning of April 19, 1993. According to this document, the pilot reported hearing "a high volume of [Hostage Rescue Team] traffic and Sniper [Tactical Operations Command] instructions regarding ... the insertion of gas by ground units," including "one conversation relative to utilization of some sort of military round to be used on a concrete bunker."

Another document provided to Congress in 1995 contained interview summaries of FBI agents. One summary in particular explicitly states that "smoke on film came from attempt to penetrate bunker w/1 military and 2 ferret rounds." The document further describes the military round as follows: "Military was ... bubblehead w/ green base."

Other documents produced to Congress in 1995 contain handwritten notes that make repeated reference to military rounds fired on April 19, 1993. For example, one page states that "smoke from bunker came when these guys tried to shoot gas into the bunker (military gas round)," while another states, "military tear gas round ... rounds bounced off."

Ironically, the documents containing these statements are in the Committee files controlled by Chairman Burton, the Attorney General's most vociferous critic. They appear to conflict fundamentally with the assertions by Chairman Burton, his Committee staff, and other Republican leaders in Congress that evidence about the use of military tear gas rounds was deliberately withheld from Congress. There is no indication that Chairman Burton or his staff thought to review these documents before accusing the Attorney General of a cover-up.

The following discussion provides additional detail about the recent allegations of cover-up and the significance of the documents provided to Congress. Copies of the relevant documents that my staff has found are enclosed with this letter.

I. Allegations of a Waco Cover-Up

Since the Waco story became a national news story on August 26, 1999, there have been repeated allegations by Republican leaders that the Department of Justice -- and in particular Attorney General Janet Reno -- have engaged in a cover-up. These allegations, coupled with calls for the Attorney General's resignation, have been widely repeated in front-page articles in national newspapers and on network news programs.

The day of the "revelation" that military tear gas rounds were used at Waco, one of

Chairman Burton's Committee staff members stated: "It's just a shock to hear . . . that this fact -- which was obviously material to what we were investigating -- was not volunteered, or was deliberately withheld."[4] During one of numerous talk show appearances, Chairman Burton said: "I think [the Attorney General] either misled Congress and covered this up or she was totally incompetent. ... [S]he should be removed because she's just not doing her job."[5]

Republican leaders reiterated their allegations of a cover-up when the FBI released a Forward-Looking Infrared Radar (FLIR) tape recorded by a surveillance airplane on April 19, 1993. This tape contained an audio track in which an FBI Hostage Rescue Team member could be heard asking permission to use military tear gas rounds to penetrate a concrete bunker adjacent to the main Branch Davidian residence. This tape has been repeatedly characterized in the media as new information that should have been disclosed to Congress.[6]

Yet another round of cover-up allegations was prompted by the Justice Department's production of a December 1993 FBI Lab Report. This 49-page report was accompanied by a letter that explained that the last page of the report, which contained the report's only reference to "a fired military 40 mm shell casing," may have been omitted from the copy transmitted to Congress in 1995. This omission led a majority staffer to state: "It boggles my mind that they would have withheld that from us. ... It suggests to me that there was a concerted effort on the part of the FBI or the Justice Department or both to cover up damning facts."[7] Similarly, Chairman Burton stated on national television: "with the forty-ninth page of this report not given to Congress, when we were having oversight hearings into the tragedy at Waco, it sure looks like they were withholding information, and she's responsible."[8]

II. The Evidence Presented to Congress in 1995

Although there have been numerous allegations of cover-up, it appears that virtually no one has examined what was actually transmitted to Congress in 1995. My staff has begun this investigation. What it shows is surprising: contrary to the allegations of cover-up, substantial evidence of the use of military tear gas rounds was, in fact, provided to Congress in 1995.

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[4] Washington Post (Aug. 26, 1999).

[5] Hannity & Colmes, Fox News (Aug. 30, 1999).

[6] *See, e.g.,* "Outside probe of Waco Assault to be Authorized," Washington Times (Sept. 4, 1999); "Hill Got Incomplete Report on Waco Gas," Washington Post (Sept. 11, 1999).

[7] "Hill Got Incomplete Report on Waco Gas," Washington Post (Sept. 11, 1999).

[8] Fox News Sunday (Sept. 12, 1999).

In 1995, the House Government Reform and Oversight Committee and the House Judiciary Committee jointly conducted an extensive investigation into the activities of federal law enforcement agencies toward the Branch Davidians at Waco, Texas. As part of that inquiry, the Committees issued document requests to the White House and the Departments of Justice, Treasury, and Defense. In addition to taking sworn testimony from nearly 100 witnesses over ten days, the Committees dispatched staff on fact-finding trips to Fort Bragg, North Carolina, and to Austin and Waco, Texas. Staff also conducted extensive interviews with officials of the Texas Rangers, McLennan County Sheriff's office, as well as the Departments of Justice, Treasury, and Defense. These included interviews with representatives of the Federal Bureau of Investigation, Bureau of Alcohol, Tobacco, and Firearms, and Drug Enforcement Administration.

The records produced to the Committees have been stored in over 40 boxes in congressional archives until recently, when they were recalled by Chairman Burton. These records are currently being held in majority offices of the Government Reform Committee.

At my request, the minority staff has begun to review these records. This review has revealed that the Department of Justice turned over to Congress in 1995 several documents that explicitly discussed the use of military tear gas rounds at Waco on April 19, 1993. These documents are described in detail below.

A. Report of Interview of Special Agent R. Wayne Smith

As discussed above, considerable attention has been given to the discovery of FLIR tapes that record a senior FBI agent authorizing the use of military rounds. What has been ignored, however, is that the Department of Justice turned over to Congress in 1995 notes of an interview with the co-pilot of the FLIR plane. These interview notes disclose the FBI's use of military rounds, the same purportedly new information revealed in the FLIR tapes.

Among the documents produced by the Department of Justice to House investigators in 1995 is a typewritten report of an interview conducted by Supervisory Special Agent Paul E. Storer of Special Agent R. Wayne Smith on June 9, 1993. SA Smith was an FBI pilot who, during the morning hours of April 19, 1993, co-piloted a fixed-wing aircraft conducting aerial surveillance of the Branch Davidian compound. According to the FBI, the widely publicized FLIR recording was made aboard the aircraft co-piloted by SA Smith.

On April 19, SA Smith and the pilot-in-command began their surveillance at approximately 7:30 a.m., which lasted for a period of approximately three hours. According to the interview notes, SA Smith recalled several observations that were recorded during his April 19 flight. In particular, he specifically recalled one conversation about the use of a military round to be used on a concrete bunker. The last page of these interview notes transmitted to Congress read:

Regarding radio transmissions heard on April 19, 1993, SA Smith advised that there was a

high volume of HRT traffic and Sniper TOC instructions regarding the requests for the insertion of gas by ground units. SA Smith recalls one conversation, relative to the utilization of some sort of military round to be used on a concrete bunker.[9]

B. Prosecutors' Interview Notes for Criminal Trial

Another document produced to Congress in 1995 is a typewritten chart prepared by Justice Department prosecutors in connection with the criminal trial of surviving Branch Davidians. Dated November 9, 1993, these notes summarize interviews with potential witnesses for the prosecution. The chart identifies each member of the FBI Hostage Rescue Team interviewed, the name of the interviewer, a summary of significant observations made by the witness, and whether each witness will be placed on the prosecution's witness list for trial.

On the sixth page of the chart is an entry that reflects an interview taken by Assistant U.S. Attorney Bill Johnston and Reneau Longoria on November 9, 1993. Although the name of the potential witness was redacted in the version produced to House investigators in 1995, a version of the same document produced to Congress on September 8, 1999, identifies the witness as Dave Corderman, a member of the Hostage Rescue Team. According to the document produced in 1995, the witness could be expected to testify that "smoke on film came from attempt to penetrate bunker w/1 military and 2 ferret rounds." In addition, the document indicates that the witness described the appearance of the military round, stating: "Military was grey bubblehead w/ green base."[10]

The identity of the film to which the chart alludes is unclear, but it appears to refer to news footage taken the morning of April 19, 1993. A preceding reference in the same chart suggests that the notes may refer to the video documentary entitled *Waco: The Big Lie*.

C. Handwritten Notes Describing Military Gas Round

Also among the documents produced by the Justice Department to House investigators in 1995 were handwritten notes clearly describing the use of military rounds in the Waco operation. One set of notes read: "Smoke from bunker – came when these guys tried to shoot gas into the bunker. (Military gas round) ... grey bubblehead w/ green base." The term "military" or "military round" appears twice again in the same paragraph. Notes on the following page read, "Obj[ective]: to keep people from fleeing into bunker."[11]

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[9]Interview of Special Agent R. Wayne Smith, Federal Bureau of Investigation FD-302 (June 9, 1993)(Attachment A).

[10] Unidentified handwritten notes produced by the Department of Justice (Attachment B).

[11]Unidentified handwritten notes Produced by the Department of Justice (Attachment C).

Another set of handwritten notes provided to the House investigators contains additional discussion of the use of the military rounds, including a discussion of the motive for using them. Specifically, the notes state:

> 1 military tear gas round
> goal - to deny that area
> to chanel exit.
> – did not want to send
> men into tunnel to
> flush out.
> – rounds bounced off.[12]

III. Conclusion

I have not reached any conclusions about the recent questions raised about Waco. Like you, I am reserving judgment until additional facts have been gathered. While the documents appear to cast doubt on the likelihood of a cover-up, I believe that there are questions that need additional investigation, such as whether all relevant information has been made public.

Unfortunately, this is not the approach taken by Chairman Burton and other Republican investigators. As has been repeatedly -- and regrettably -- demonstrated over the last few years, they accuse first and investigate later. In this instance, Chairman Burton has made the extraordinarily serious accusation that the Attorney General of the United States has participated in a cover-up. He made this allegation without reviewing even the contents of the files contained in his own offices. This is embarrassing to Congress and, more importantly, profoundly unfair to the Attorney General.

The American people deserve a fair and independent investigation of these matters. That is why I am pleased that the Attorney General has asked you to investigate and why I am transmitting these documents to you. Sadly, it appears that the Congress is once again approaching an important investigation as a chance to score partisan political points, not as an impartial search for the truth.

Sincerely,

Henry A. Waxman
Ranking Minority Member

cc: Members of the Committee on Government Reform

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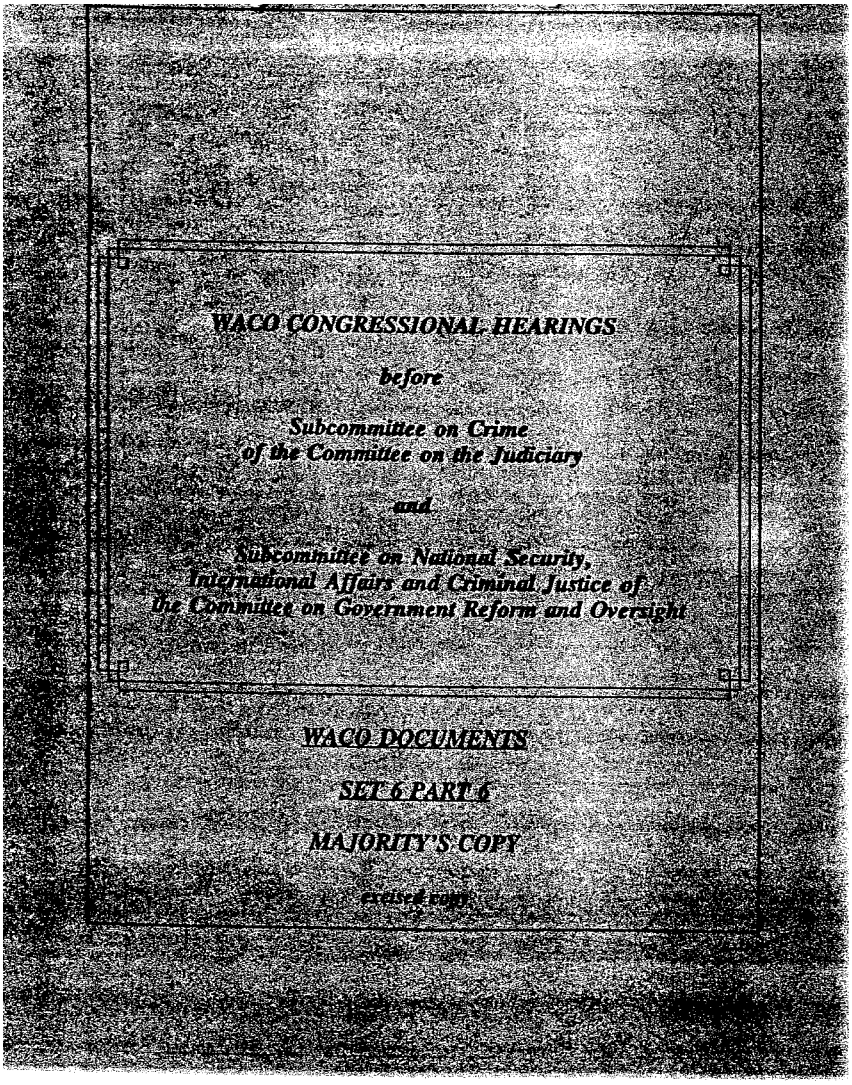
[12]Unidentified handwritten notes produced by the Department of Justice (Attachment D).

ATTACHMENT A


WACO CONGRESSIONAL HEARINGS
before
Subcommittee on Crime
of the Committee on the Judiciary
and
Subcommittee on National Security,
International Affairs and Criminal Justice of
the Committee on Government Reform and Oversight
WACO DOCUMENTS
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FD-302 (Rev. 3-10-82)

FEDERAL BUREAU OF INVESTIGATION

Date of transcription 6/15/93

P

Special Agent (SA) R. WAYNE SMITH, SSAN [redacted] of the Richmond Office of the Federal Bureau of Investigation (FBI) was interviewed. SA SMITH was aware of interviewing agent's identity and was advised that the interview pertained to his travel to Waco, Texas. SA SMITH was further advised that the interview was being conducted as a result of an inquiry requested by the DEPARTMENT OF JUSTICE (DOJ) into the Branch Davidian Compound incident.

SA SMITH entered on duty with the FBI on September 24, 1973, and has been assigned to the Cincinnati and New York Field Offices, Monterey, California, Boston Field Office and currently is assigned to the Richmond FBI Office. SA SMITH currently holds a commercial aircraft pilot's license for single engine aircraft, has an instrument rating, and flew as Pilot-In-Command (PIC) for the Boston Office Surveillance Squad for six years prior to becoming Richmond's PIC and Aviation Coordinator.

SA SMITH advised that on approximately March 31, 1993, he was advised by FBI Headquarters, that he, SA CREASY and Richmond's aircraft would be required in Waco, Texas, sometime during the middle of April, 1993, to participate in air surveillance over the Branch Davidian Compound. On April 13, 1993, SA SMITH, accompanied by SA CREASY, departed Richmond, H Virginia, [redacted] arriving in Waco, Texas, at TCTI AIRPORT on April 14, 1993, at approximately 5:15 p.m. local Waco time.

Upon arrival at TCTI AIRPORT he immediately went to the Air Operations Command Post located in the hanger at TCTI AIRPORT and met with SA [redacted] who is assigned to the H Hostage Rescue Team (HRT) as a helicopter pilot. SA [redacted] provided three packages of printed material regarding the Waco air operations which spelled out the duties and responsibilities, shifts to be worked, agents who were working the shifts, brief background of the Branch Davidian Compound situation, and radio channels utilized for the operation. SA SMITH further advised that the frequency on which air operations communicated with

F

Investigation on 6/9/93 at Richmond, Virginia File # [redacted]

by SSA PAUL E. STORER/jf Date dictated 6/14/93

FD-302a (Rev. 11-15-83)

F [redacted]

Continuation of FD-302 of SA WAYNE R. SMITH, On 6/9/93, Page 2

ground operations was the one utilized by the sniper Tactical Operation Center (TOC). Any communications from aircraft to aircraft would be done via aircraft frequencies as opposed to Bureau frequencies. SA [redacted] also provided topographical maps with designations marked on the maps showing landing zones for helicopters, all FBI positions, BUREAU OF ALCOHOL, TOBACCO AND FIREARMS positions, as well as symbols depicting the location of sensors placed on one side of the Branch Davidian Compound. The Branch Davidian Compound locations were color coded as follows: white indicated the front of the compound; green indicated the left side of the compound; red indicated the right side of the compound, and black indicated the rear or back of the compound. Additionally, SA [redacted] identified several color aerial photographs of the Branch Davidian Compound that were tacked to the Air Operations Command Post wall. SA SMITH advised that he and SA CREASY were assigned a 6:00 a.m. to 2:00 p.m. workshift with aerial surveillance to occur from 7:00 a.m. to 11:00 a.m. SA SMITH indicated that this initial briefing lasted approximately forty-five minutes. After receiving the briefing from SA [redacted] SA SMITH was released for the day and told that his first shift would begin in the morning hours of April 15, 1993.

SA SMITH also noted that he and SA CREASY brought with them two Motorola Saber hand-held radios that had been reprogrammed specifically to be compatible with the Branch Davidian Compound operation.

As part of his duties and responsibilities, SA SMITH advised that as part of the air surveillance, he was to communicate with the Sniper TOC and was, in fact, responsible to the Sniper TOC for operational instructions and directions. Also, prior to departing TCTI AIRPORT, SA SMITH was instructed to contact the FBI "Night Stalker" aircraft to inform the aircraft that his aircraft was taxiing and ready for departure. SA SMITH understood his mission to be one of observing the Branch Davidian Compound from approximately [redacted] feet but to go no lower than [redacted] feet; however, as the airspace around the Branch Davidian Compound had been restricted and only FBI controlled aircraft permitted in the area, lower altitudes could have been utilized. SA SMITH indicated that his mission was to observe any person or persons entering or leaving the Branch Davidian Compound and to report such activity to the Sniper TOC. In the event he made such an observation he was to remain on station

until helicopter support could be directed to the location where the individual might have been observed. SA SMITH also pointed out that the aircraft was to act as a relay point for communications, if such became necessary.

From April 15 until April 18, 1993, SA SMITH observed only Bradley Fighting Vehicles (BFV) servicing the gasoline generators that were necessary for perimeter lighting of the Branch Davidian Compound and observed nothing out of the ordinary.

On April 19, 1993, at approximately 6:00 a.m., he and SA CREASY arrived for duty at TCTI AIRPORT anticipating a flight departure at approximately 6:45 a.m. Due to low ceiling cloud cover conditions, launching of the aircraft was delayed. SA SMITH proceeded to the Air Operations Command Post and spoke to SA WALT GARCIA, a PIC of the FBI's Washington Metropolitan Field Office, who was filling in at the command post for SA [redacted] SA GARCIA advised SA SMITH that an tactical operation was underway in an attempt to resolve the situation, that began at approx- imately 6:00 a.m. wherein Combat Engineer Vehicles (CEV) were penetrating the Branch Davidian Compound perimeter walls and inserting gas. SA GARCIA advised that agents were being fired upon from individuals inside the compound at the time of the initial penetration. SA GARCIA advised that the weather was not conducive to safe flying conditions and recommended a delayed launching of the Richmond aircraft crew. SA GARCIA left the final decision to SA SMITH and SA CREASY and their judgment as to the weather conditions and safety of the aircraft and personnel.

H

With respect to the operation itself, SA SMITH advised that he had heard from other FBI pilots and personnel on the scene, that an operational plan had been on the Attorney General's desk, and if the Attorney General approved the plan it would be implemented as early as Monday, April 19, 1993. However, SA SMITH had no first-hand knowledge of the details of the operation prior to arriving for duty on April 19, 1993.

While checking weather conditions for a launch on April 19, 1993, FBI Special Agent in Charge (SAC) RICKS entered the Air Operations Command Post to check on the status of air surveill- ance aircraft. SAC RICKS was advised that as soon as weather permitted, SA SMITH and SA CREASY would depart TCTI AIRPORT to

FD-302a (Rev. 11-13-83)

[redacted]

Continuation of FD-302 of SA WAYNE R. SMITH, On 6/9/93, Page 4

initiate air surveillance. Prior to departing Air Operations Command Post, SA GARCIA warned SA SMITH that weapons were being fired and reminded SA SMITH that it was believed that the individuals in the Branch Davidian Compound were in possession of a .50 caliber rifle. Additionally, SA SMITH advised that Richmond's aircraft had experienced mechanical difficulties and he was assigned another FBI Field Office's aircraft [redacted] for the air surveillance mission on April 19, 1993.

During pre-flight preparations, SA SMITH recalled that "Night Stalker" landed prior to his departure with the "Night Stalker" pilot advising that the weather was bad, including high winds and a low ceiling. To the best of SA SMITH's recollection there was no air surveillance over the Branch Davidian Compound for approximately thirty minutes. At approximately 7:15 a.m., SA SMITH and SA CREASY determined that the cloud cover was sufficiently high to permit a safe takeoff, and air surveillance was initiated over the compound at approximately 7:30 a.m., April 19, 1993. SA SMITH advised that he was flying in the co-pilot position, while SA CREASY was in the PIC position.

Upon arriving on scene, SA SMITH observed BFVs at the corners of the compound and a CEV moving slowly up to the compound exterior walls, inserting a boom and penetrating the "white" side of the building. At the time he observed this boom penetration he was flying at approximately 2000 to 2500 feet and was utilizing gyro stabilized binoculars. SA SMITH advised that the boom penetrations appeared to occur approximately every one-half hour and observed numerous penetrations of the boom into the compound walls during the entire surveillance period of approximately three hours, from 7:30 a.m. to 10:30 a.m. While on station, SA SMITH observed an unknown individual leave the front side of the compound and return to the compound's interior. Although SA SMITH could not observe what the individual was doing he understood from radio traffic that the individual was picking up a telephone. This individual's activity was consistent with such movement. SA SMITH indicated that he was relieved on station by the Omaha FBI Office flight crew, and he and SA CREASY returned to TCTI Airport. SA SMITH cannot recall whether "Night Stalker" was flying at the time he was relieved of duty. Upon arrival at TCTI AIRPORT, SA SMITH returned to the Air Operations Command Post and was debriefed regarding observations made during his tour of duty. SA SMITH became aware of the fire at the

[redacted]

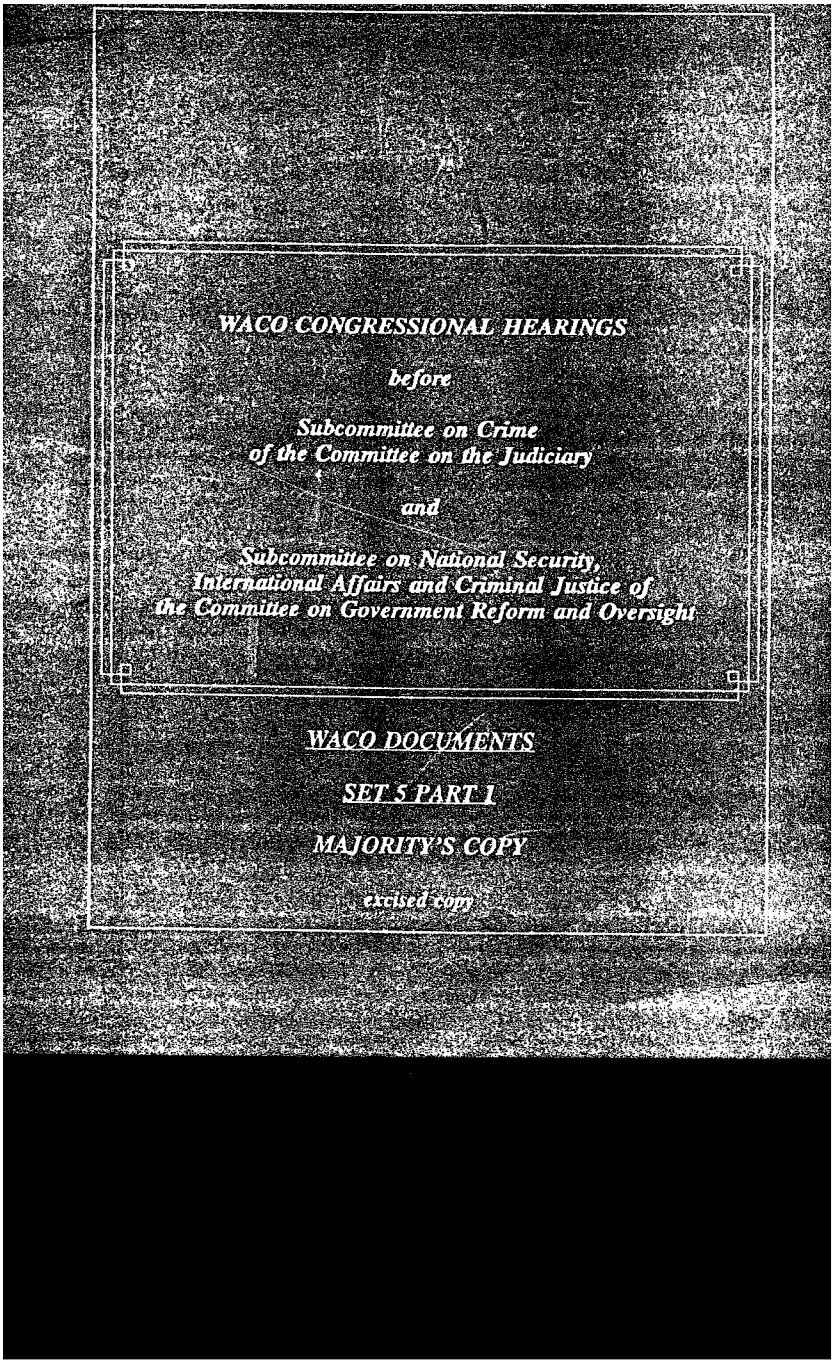
Branch Davidian Compound while listening to commercial radio news coverage.

Regarding radio transmissions heard on April 19, 1993, SA SMITH advised that there was a high volume of HRT traffic and Sniper TOC instructions regarding requests for the insertion of gas by ground units. SA SMITH recalls one conversation, relative to the utilization of some sort of military round to be used on a concrete bunker and additional traffic pertaining to the need for additional gas rounds for the M-79 grenade launchers. SA SMITH also recalled radio traffic regarding the coordination and eventual approval of gas insertions at the compound by the Sniper TOC.

SA SMITH advised that routine aircraft pilot logs containing the dates, type of aircraft flown, tail number of the aircraft flown, airport of departure, airport of return, total number of hours flown, number of landings made, name of person or persons aboard, category of the flight hours, was maintained. SA SMITH also filled out the standard FBI flight record, copies of which were sent to the San Antonio FBI Office, with the originals maintained in the Richmond FBI Office. There were no video or audio recordings made. Photographs were taken by SA CREASY and SA SMITH by 35 millimeter cameras, and some photographs taken of the Branch Davidian Compound were subsequently enlarged to 8"x10" photographs and sent to FBI Headquarters, Unit Chief MIKE HAGEN, of the Aviation Unit.

SA SMITH could provide no further information.

ATTACHMENT B


WACO CONGRESSIONAL HEARINGS
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the Committee on Government Reform and Oversight
WACO DOCUMENTS
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Re: summary of interviews from

- WACMUR F.B.I. H.R.T. INTERVIEW SCHEDULE 11/9/93

	DATE/TIME INTERVIEWED	INTERVIEWER	SIGNIFICANT OBSERVATIONS: DURING 51 DAYS & ON THE 19TH	WITNESS LIST YES/NO B.U.)
		WHITE SIDE		
BLUE SNIPERS		RAY JAHN AND JOHN PHINIZY		
[redacted]	11/8 AND 11/9 1993		-BEES NEST OF PEOPLE RUNNING	YES
	NO INTERVIEW			NO
	11/8 AND 11/9			NO
	11/8 AND 11/9			NO
	11/8 AND 11/9		-GUN BELT AND BLACK VEST CAME FROM ONE OF THE THREE ALSO SAYS ONE OF THE THREE WAS TOTALLY LOADED WITH MILITARY GEAR	YES
	11/8 AND 11/9		-SEES WHAT HE BELIEVES TO BE A GUN BARREL -LOOKED FOR THE AVRAAM MAGS BUT COULD NOT FIND -1 OF 4 HAD A BLACK SKI CAP AND A HOLSTER-HE ALSO SAW 2 CAMO JACKETS AND DESCRIBES A DISTINCTION	YES
	11/8 AND 11/9		-GOOD DESCRIPTION OF THE FIRE	NO
	11/8 AN 11/9		-SPOTTED AVRAAM & CALLS IT OUT -NOT 50 CAL MAGS BC TOO SMALL	MAYBE
	11/8 AND 11/9			NO
		GOLF TEAM		
	NO INTERVIEW	BILL JOHNSON AND RENEAU LONGORIA ON 11/9 AND RAY JAHN AND JOHN PHINIZY ON 11/10		NO
MORRISON	11/8 AND 11/9		-SEES MAN IN FOYER W/ MASK BEHIND PIANO WITH SWINGING MOTION(GOLF) AND THEN KNEEL AND 'WASH HANDS' -COULD HAVE SHOT BUT DIDN'T -SEES WHITE SIDE EVENTS FROM S-1 -DESCRIBES MARJORIE & THE 4 -BELIEVES MAN AT FRONT DOOR MAY BE AVRAAM BUT NOT ONE OF 3	YES
B.V.#2				

[redacted]	11/8 AND 11/9	-ONE OCCASION FLASHBANG FIRED -FIRING PORTS OBSERVED W/THERM IMG -BRIEF CHRONOLOGY FROM THE TEAM: [redacted] SHOT 1ST ROUNDS INTO TOWER AND THEN PUT THREE APIECE INTO EACH WINDOW-TOTAL 120 90% IN -AROUND 10:00 SEE GUY CRAWLING -NEXT SEE PHONE GUY OUT FRONT -NEXT TAKE DEBREE OFF TANK -12:00 CEV MAKES 10-15 FT HOLE TO EXIT SEE BEES NEST OF PEOPLE -SEE MAN IN FOYER CROUCHING AND WALKING BACKWARD-. [redacted]SEES	NO
	11/8 AND 11/9	-DESCRIBES DIFFICULTY IN OPENING THE FRONT DOOR DUE TO FORTIFICATIONS	NO
[redacted]	11/8 AND 11/9	-ASKED FOR PERMISSION TO BURY DOGS AND PICKED UP FLASHLIGHT AND BODY BUNKER -GRABBED ATF BAG THE DAY THEY REMOVED THE ATF VEHICLES -NEVER BUMPED THE BUILDING BEFORE THE 19TH -THEY BROUGHT A TECH OUT TO TAKE PHOTOS OF FRONT -GOOD DESCRIPTION OF 19TH/FIRE EVENTS INC. M79S DO NOT MAKE A POPP SOUND & THEY DID NOT HEAR FIRING -PULLS DEBREE OFF TANK AFTER DEEP PENETRATION ON WHITE SIDE -WHITE CLOUD CREATED WHEN GAS INSERTED & THEN DISSIPATES NO FIRE-FIRE STARTED A LONG TIME AFTER PENETRATION [redacted] JACK SEE MAN SHORTLY BEFOG FIRE ON WHITE SIDE WITH M-16 WALKING BACKWARDS WITH SOMETHING IN HER HANDS[redacted]SAYS THEY WERE LESS THAN 40 YARDS AWAY AND HE WAS NOT PAYING ATTENTION TO THEM. -ARRESTS CRADDOCK, TAKES FOR MED OVERHEARS INTERVIEW W[redacted]	YES

[redacted]	11/8 AND 11/9			-SEES WINDOW ON W/R SIDE W/ PRODUCE BOX AND MATTRESS & BINOCULARS DURING DAY -IN THE SECOND WEEK THEY PICK UP THE INDIVIDUAL IN THE WINDOW USING NIGHT VISION AND SHINE THE LIGHTS ON HIM -BEFORE FBI BEGAN MUSIC THERE WAS ONE DAY WITH LOUD MUSIC -ON 19TH SEE MAN DIGGING IN BEDROOM -DESCRIPTION OF THERMAL IMAGING -DESCRIBES THE DISMANTLING PROCESS	YES
	11/8 AND 11/9			-RECUES MARJORIE WITH [redacted] -HEARS SHOTS AND MINUTES LATER IT WAS OVER	YES
ATHERTON			LEROY JAHN JOHN LANCASTER		YES
					MAYBE
					YES
					YES
					MAYBE
	11/9		BILL JOHNSON AND RENEAU LONGORIA	-HAND CUFFED DOYLE	NO
	11/9			-SAW A CHANGE OF GUARDS, W/LOADING OF MAGS AND SAND BAGS (THERM IMG.) -TOOK HRT PICTURES DURING FIRE	NO
	10/9/93 A.M.		ALL TEAM		NO
					REBUTTLE
	11/9		JOHNSON & LONGORIA	-LISTENING TO 3 CHANELS IN [redacted] TANK DURING19TH -VISITED GARAGE TO CHANGE BATTERY	NO
				BLACK SIDE	
			JOHNSON & LONGORIA.	-HEARS SHOTS FIRED WHILE AT SAW 1	NO

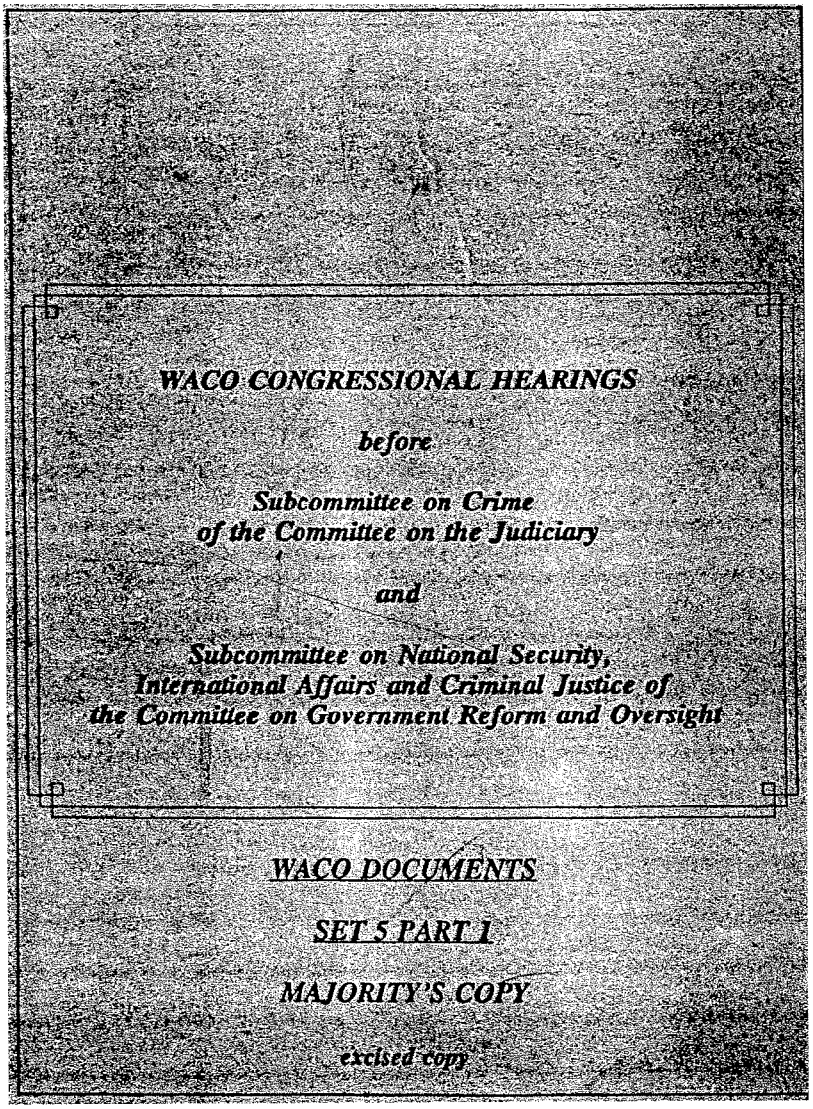
[redacted]			BILL JOHNSON AND RENEAU LONGORIA		
	11/9			4/19 [redacted] IN M-60 FOX HOLE BY BUS	NO
	11/9			4/19 [redacted] ON S-2 SAW	NO
	11/9			-THINKS 50 CAL WAS USED JUST AFTER FIRE STARTED & HEARS FIRE OVER HEAD -SAYS [redacted] UNSUCESSFUL ATTEMPT TO PUT GAS IN THE BUNKER=SMOKE IN BIG LIE FILM -WHEN FIRE STARTED THEY WERE UP CLOSE W/ ENGINE OFF & HEARD SHOOTING INSIDE IN A DISTINCT RYTHM THOUGHT THEY WERE SHOOTING EACH OTHER [redacted] HEARS A ROUND OVER HIS HEAD LARGER THAN A 300-POSS 50 CAL	NO
	11/9				NO
TOM ROWEN	11/9		BILL JOHNSON AND RENEAU LONGORIA	[redacted] TOM [redacted] IN TANK [redacted] DROVE-TOM SHOT [redacted] TC & SPOTER] -SAW PORT HOLES -CLOSE AS 20 YARDS IN BRADLEY -GUY DRESSED AS GIRL DUMPING WASTE INTO POND-DEAD GUY -SHOT FLASHBANGS AT PEOPLE COMMING OUTSIDE W/O AUTHORIZATION -SAW SCHNIEDER & 2 OTHERS & PICKED UP LETTER DURING SMOKE CAN INCID. -TOM HAS SOMEONE LEANING OUT AND SHOTING AT HIM HE RETURNS FERRETS ONLY BACK AND FORTH POPPING/FLASHE -HEARS CRACKING OVERHEAD WHILE AT BLACK WHITE CORNER	YES
[redacted]	11/9			-BLACK D-1 FIRST TO SEE FIRE ALSO SAW FIRE FROM GD-1 [redacted] SAW FLASH B-D-1] -GOOD ON FIRE PROGRSSION ON BLACK -RECIEVING FIRE DURING THIS TIME -SAW HANDGUN, GASMASK ETC FROM CRADDOCK	NO

[redacted]	11/9			-WERE TO HIDE B/H LIGHTS UNTIL COMP -1ST CEV NOT SEEN -IF COMPROMISE THEY WERE TO SHOT TEAR GAS AT DOG HOUSE, THEN TOWER, THEN 1ST & 2ND FLOORS[1ST WAVE] THEN 2ND WAVE EMPHASIS WAS ON KITCHEN(RECIEVED MUCH FIRE BY THIS TIME) -NOT SUCCESSFULPEN. DOG H B/C STURDY -WOULD NOT CONFUSE FERRETS W/GUN FIRE B/C NO POPPING,NO FLASH, WINDOWS KNOCKED OUT	YES
	11/8		BILL JOHNSON LEROY JAHN JOHN LANCASTER		NO
	11/8				NO
	11/8				MAYBE
	11/8				NO
TOULOUSE	11/8				YES
					BACK-UP
	NO INTERVIEW				
			RED SIDE		
				-	
[redacted]	11/9		ALL RED SIDE MEETING ALSO LEROY JAHN JOHN LANCASTER	-FEMALE CAME OUT WANDERED AND WENT BACK INTO BLACK SIDE -LOVELOCK-BLUE JACKET,GAS MASK,GUN HOLSTER BELT, SKI CAP -DROPPED (ALSO [redacted] VINCENT) -CASTILLO BLACK LOAD BEARING VEST, THEN YOU COULD SEE ARMS(ALSO VINCENT) -THIBADEAU-15 20 YDS BEHIND, BLACK GUNBELT, DID HIS STUFF EDARLY AND QUICKLY ON WAY OUT -SWEATSHIRT, CAMO JACKET, GREEN BELT W/ HOLSTER(VINCENT [redacted]	YES
	11/9				MAYBE
VINCENT	11/9				YES
	11/9				BACK-UP
	11/9				BACK-UP

[redacted]	11/9			YES
		GREEN SIDE		
	11/9	BILL JOHNSON AND RENEAU LONGORIA	-51 DAYS FLASH BANGED IF CAME OUT NOTHING WAS PICKED UP -FERRET SHOOTER ON 19TH S-2 BRADLY -SMOKE ON FILM CAME FROM ATTEMPT TO PENETRATE BUNKER W/ 1 MILITARY AND 2 FERRET ROUNDS -MILITARY WAS GREY BUBBLEHEAD W/GREEN BASE [redacted] FIRES 3 ROUNDS INTO KITCHEN AND LESS THAN 30 SEC LATER SEES SMOK	NO UNLESS REBUTTLE
	11/9		-TANK COMMANDER-DESCRIBES COMPROMISE -SAW BARRACADES BOXES AND MATTRES	NO
	11/9		-LOADER ON 19TH	NO
	11/10		-DRIVER ON 19TH -HEARS GUNFIRE DURING THE TIME THE GUY WAS ON THE ROOF-SEES A VRAAM -GOOD DESCRIP OF FIRE FROM THAT PT -GOOD ON BUNKER INC. W/OPENING OFBACK AND SHOOTING AT ANGLE -BEST DESCRIP OF MISTY RESCUE(1ST SEE STANDING IN A DAZE 20-30 FT FROM BLDG ALSO TIES IN LOOKING FOR MAN WITH A GUN-OUTSIDE THE WIRE-CRADDOCK COULD BE SAME MAN IF HE STAYED INSIDE WIRE HELPS ARREST CRADDOCK **-HE ASKS AND CRADDOCK TELLS HIM HOW HHHE GOT THERE**	MAYBE REBUTTLE
[redacted]	11/9		-SAW BARREL AND SCOPE OF 50 CAL -RIFLE COVER ON 19TH -HEARS GUBFIRE WHEN FIRE STARTS-BACK OPEN FROM INSIDE	NO
		WHITE/GREEN CORNER		
CRAIG				
[redacted]				
		WHITE SIDE		
CHARLIE TEAM				
[redacted]	11/9			NO
	11/9			NO

HELO					
[redacted]	11/9				NO
	11/9			-LAST 3 WKS IN BLUE HELO-STOP INGRES -DID NOT SEE BODY ON WATER TANK & THINKS HE WOULD HAVE IF IT WAS THERE -19TH MISSION MEDIVAC NO PICTURES	NO
	11/10				NO
	11/9			-HANDLED SUPPLIES & LOGISTICS	NO
	11/9				NO
	11/10				NO
	NOT NTERVIEWED				NO

ATTACHMENT C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Saw Beagle etc.
green / side

19th

pull up into position on green side
i.e. they would fire on command
[redacted] H unless fired upon
sees guy on roof - good description of ... Only heard gunfire when guy was on roof -
[redacted] — good description of ...
H
Shot 1 gas round

Rebuttal
Smoke from Bunker — Came when these guys tried to shoot gas into the Bunker -
(military gas round)
Dark grey bubble head w/ green base
1 military round ; 2 other ferret
↓ military
1st target ferret into Bunker
8 ft drop 3° angle
Military Bunsdoff Also

[illegible]
Threw off Compromise
... called

Obj: to keep people from fleeing into Bunker

Were they shot at?

Heard popping but does not know if he was being fired at.

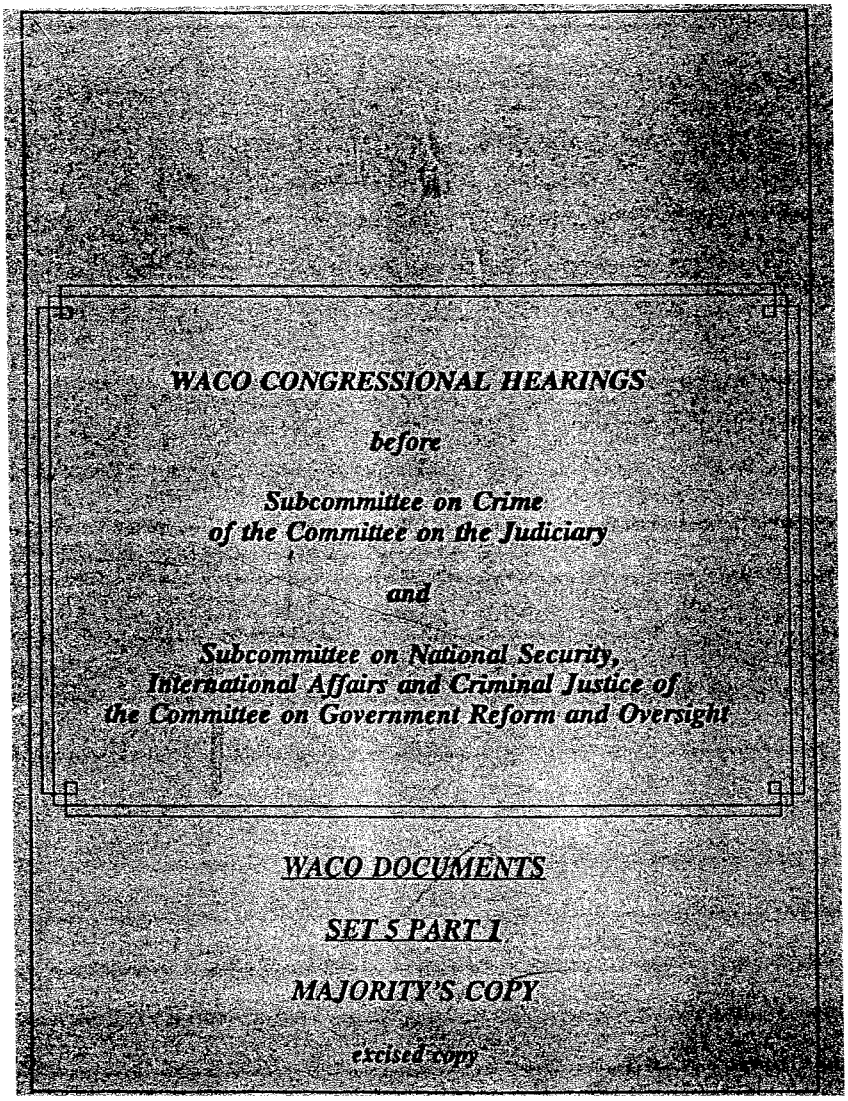
Intrusions into compound
1st one - green side

[redacted] saw barricade - Boxes & mattress
saw all intrusion from white side -

H

[redacted] hears gunfire when fire starts - Back of Bradley open - - Pool fires 3 rounds into ... Bunker ... & at same time ... Less than 30 secs later he said he saw

ATTACHMENT D


WACO CONGRESSIONAL HEARINGS
before
Subcommittee on Crime
of the Committee on the Judiciary
and
Subcommittee on National Security,
International Affairs and Criminal Justice of
the Committee on Government Reform and Oversight
WACO DOCUMENTS
SET 5 PART 1
MAJORITY'S COPY
excised copy

- Decontamination efforts
- chemicals

Liason w/ Rangers to turn the scene over.

How he knows no shots
- Never heard anyone saying firing
- no log entries
- No 110 target
- no admission
SOP would require it.

MYOG↑ says this

1 military tear gas round
goal - to deny that area to channel exit.
- Did not want to send men in to tunnel to flush out.
- rounds bounced off.

EXHIBIT 2

INTERIM REPORT TO THE DEPUTY ATTORNEY GENERAL

CONCERNING THE 1993 CONFRONTATION AT THE MT. CARMEL COMPLEX

WACO, TEXAS

JULY 21, 2000

PURSUANT TO ORDER NO. 2256-99
OF THE ATTORNEY GENERAL

John C. Danforth
SPECIAL COUNSEL

Preface

On the day that Attorney General Reno appointed me Special Counsel, I said that this investigation would examine whether government agents engaged in bad acts, not whether they exercised bad judgment. It is an important distinction. A free society cannot tolerate a government that commits bad acts such as killing citizens because they pose a nuisance, or because they express unpopular ideas, or even because they are dangerous. While charges of deliberate governmental misconduct justify a far-reaching investigation of this type, there are good reasons why poor judgment– conduct alleged to be careless or imprudent– does not. Established mechanisms, including civil lawsuits, are available and sufficient to resolve such claims against the government.

Make no mistake: the bad acts alleged in this case are among the most serious charges that can be leveled against a government– that its agents deliberately set fire to a building full of people, that they pinned children in the burning building with gunfire, that they illegally employed the armed forces in these actions and that they then lied about their conduct. I took such charges very seriously and began this investigation with my own mind totally open as to the issues before me. I required all members of my investigative staff to affirm in writing their commitment to objectivity. This Interim Report summarizes the exhaustive efforts undertaken to date to investigate every lead and to test every theory. There is no doubt in my mind about the conclusions of this report. Government agents did not start or spread the tragic fire of April 19, 1993, did not direct gunfire at the Branch Davidians, and did not unlawfully employ the armed forces of the United States.

In fact, what is remarkable is the overwhelming evidence exonerating the government from the charges made against it, and the lack of any real evidence to support the charges of bad acts. This lack of evidence is particularly remarkable in light of the widespread and persistent public belief that the government engaged in bad acts at Waco. On August 26, 1999, for example, a *Time* magazine poll indicated that 61 percent of the public believed that federal law enforcement officials started the fire at the Branch Davidian complex.

This is a matter of grave concern. Our country was founded on the belief that government derives its "just powers from the consent of the governed." When 61 percent of the people believe that the government not only fails to ensure "life, liberty and the pursuit of happiness" but also intentionally murders people by fire, the existence of public consent, the very basis of government, is imperilled.

The readiness of so many of us to accept as true the dark theories about government actions at Waco deserves serious attention by all of us. To that end, I offer the following thoughts.

We all carry the horror of the Waco tragedy with us. We have reviewed the events of February 28 and April 19, 1993 so many times, and they will not leave us alone: the sight of ATF agents carrying their dead and wounded from the Branch Davidian complex, the image of that same complex burning against the sky and the sound of the wind whipping the flames. In the face of such

calamity, we have a need to affix blame. Things like this can't just happen; they must be the government's fault. We are somehow able to ignore the contrary evidence– never mind the fact that the FBI waited for 51 days without firing a shot, never mind the evidence that Davidians started the fire, never mind that FBI agents risked their own lives in their efforts to rescue the Davidians– and we buy into the notion that the government would deliberately kill 80 people in a burning building.

Ample forums exist to nurture our need to place blame on government. Sensational films construct dark theories out of little evidence and gain ready audiences for their message. Civil trial lawyers, both in the public and private sectors, carry the duty of zealous representation to extremes. The media, in the name of "balance," gives equal treatment to both outrageous and serious claims. Congressional committees and Special Counsels conduct their own lengthy investigations, lending further credence to the idea that there are bad acts to investigate. There is even pressure on them to find some bad act to justify their effort and expense. Add to all of this the longstanding public cynicism about government and its actions, and the result is a nearly universal readiness to believe that the government must have done *something* wrong.

The only antidote to this public distrust is government openness and candor. Instead, and tragically, just the opposite occurred after Waco. Although the government did nothing evil on April 19, 1993, its failure to fully and openly disclose to the American public all that it did has fueled speculation that it actually committed bad acts on that day. Even in their dealings with this investigation, some government officials have struggled to keep a close hold on information. More important, the government did not disclose to the public its use of pyrotechnic devices at Waco until August 1999– six years after the fact. This non-disclosure is especially puzzling because the use of these pyrotechnics had nothing to do with the fire. They were used four hours before the fire began, 75 feet from the Branch Davidian residence, and in a manner that could cause no harm. Yet the failure to disclose this information, more than anything else, is responsible for the loss of the public faith in the government's actions at Waco, and it led directly to this investigation. The natural public reaction was that, if the government lied about one thing, it lied about everything.

The issues that remain open in this investigation concern the reasons why the government did not disclose this information. We have not found evidence of a massive government conspiracy. The team of agents who fired the pyrotechnics told the truth about it from the very beginning. Many government officials, including the Attorney General and the Director of the FBI, did not know that pyrotechnics had been used at all. Unfortunately, a few individuals within the Department of Justice and the FBI, including a few attorneys, had this information and did not tell.

Lawyers in private practice often volunteer as little information as possible. But playing it close to the line is not acceptable for people representing the United States government. Government lawyers have responsibilities beyond winning the cases at hand. They are not justified in seeking victory at all costs. A government lawyer should never hide evidence or shade the truth, and must always err on the side of disclosure.

Government lawyers carry on their shoulders responsibility for not only the prosecution of specific cases, but also for public confidence in our system of government– the "consent of the governed" enshrined in the Declaration of Independence. Indeed, this responsibility rests heavily on the shoulders of all government officials. The actions of these few government employees who failed to

disclose the use of pyrotechnics are reprehensible because they undermined the public confidence with which they were entrusted.

In today's world, however, it is perhaps understandable that government officials are reluctant to make full disclosures of information for fear that the result of candor will be personal or professional ruin. Any misstep yields howls of indignation, calls for resignations, and still more investigations. Several Department of Justice personnel told Office of Special Counsel investigators that they viewed the 1995 Congressional hearings as a partisan effort to attack Attorney General Reno. An FBI official complained about the "us against them" atmosphere and said "when [Congress] started government by subpoena, I stopped sending e-mails." Reacting to exposés, investigations and lawsuits, government officials develop a bunker mentality and protect rather than disclose information, and in the process do immeasurable damage to public confidence in government.

Breaking this vicious circle of distrust and recrimination is essential if we are to rebuild the consent of the governed on which our system depends. We all have the responsibility to distinguish between healthy skepticism about government and the destructive assumption that government is an evil force engaged in dark acts. Government, in turn, has a responsibility to be open and candid, so that light might dispel all suspicion of darkness.

This is why the Waco investigation is the most important work I have ever done. It was important to unearth the facts about Waco, one way or the other, and to set those facts out as clearly and openly as possible. It is my hope that, in so doing, this investigation will not only resolve the dark questions of Waco, but will also begin the process of restoring the faith of the people in their government and the faith of the government in the people.

John C. Danforth
St. Louis, Missouri
July 21, 2000

INTRODUCTION

THIS INTERIM REPORT contains an overview of the findings to date of the Special Counsel in response to the questions directed to him by Attorney General Janet Reno in Order No. 2256-99, dated September 9, 1999. The questions pertain to the 1993 confrontation between federal law enforcement officials and the Branch Davidians at the Mt. Carmel Complex near Waco, Texas. The Interim Report is issued pursuant to Section (e) of Order No. 2256-99 which provides, in relevant part, that the Special Counsel may issue "such interim reports as he deems appropriate."

The Office of Special Counsel has organized the Interim Report in the following format:

(I) a description of the Issues investigated by the Special Counsel;

(II) the Conclusions of the Special Counsel to date;

(III) a description of the Investigative Methods used by the Special Counsel; and

(IV) a Statement of Facts relevant to the Special Counsel's investigation.

The Special Counsel emphasizes that this report is interim in nature. The Final Report, which the Special Counsel expects to deliver to the Deputy Attorney General later this year, will contain conclusions concerning those issues which the Interim Report indicates are still under investigation, copies of documents and other evidence supporting the conclusions of the Special Counsel, and such other information and analysis as the Special Counsel considers appropriate.

I. Issues Investigated by the Special Counsel

On September 9, 1999, the Attorney General appointed former United States Senator John C. Danforth as Special Counsel to investigate the 1993 confrontation between federal agents and the Branch Davidians ("Davidians") that resulted in the deaths of four agents of the Bureau of Alcohol, Tobacco and Firearms ("ATF") and at least 80 Davidians.[1] Senator Danforth and his staff negotiated the terms of the Order directly with the Attorney General and her staff from September 5 to September 8, 1999. Senator Danforth and the Attorney General agreed that the investigation should determine whether representatives of the United States committed bad acts, not whether they exercised bad judgment.[2] Therefore, they drafted a very specific Order that identified five principal issues:[3]

(1) whether agents of the United States started or contributed to the spread of the fire that killed members of the Branch Davidian group on April 19, 1993;

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[1]The figure of "at least 80" dead is based upon recovered bodies, including six Davidians killed on February 28, 1993, but excluding two unborn children, one of which was near term. The Office of Special Counsel cannot state with certainty the exact number of deaths because of the extensive burning and commingling of bodies that occurred during the tragic fire on April 19, 1993, especially in the concrete bunker area of the complex where the bodies of most of the women and children were found.

[2]For example, the Office of Special Counsel was not tasked with and will not address the issue of whether it was appropriate for ATF to execute a raid on February 28 or for the Federal Bureau of Investigation ("FBI") to execute its gas insertion plan on April 19, 1993. These issues require an evaluation of judgment; an evaluation that is outside the scope of the Attorney General's mandate.

[3]A copy of Order No. 2256-99 is attached hereto as Exhibit A. The Order lists six issues to investigate. For ease of organization, this Report has combined the two "coverup" issues into one. In addition, the Order refers to the Mt. Carmel "compound." Certain members of the Branch Davidian group interviewed by the Office of Special Counsel objected to this characterization. In deference to them, this Interim Report refers to their place of residence and the surrounding structures as the Branch Davidian complex.

(2) whether agents of the United States directed gunfire at the Branch Davidian complex on April 19, 1993;

(3) whether agents of the United States used any incendiary or pyrotechnic device at the Branch Davidian complex on April 19, 1993;[4]

(4) whether there was any illegal use of the armed forces of the United States in connection with the events leading up to the deaths occurring at the Branch Davidian complex on April 19, 1993;[5] and

(5) whether any government representative made or allowed others to make false or misleading statements, withheld evidence or information from any individual or entity entitled to receive it, or destroyed, altered or suppressed evidence or information concerning the events occurring at the Branch Davidian complex on April 19, 1993.[6]

At Senator Danforth's request, the Order of the Attorney General gave Senator Danforth and his staff the power to prosecute federal crimes concerning the above issues and any criminal attempt to interfere with his investigation. Finally, the Order required that Senator Danforth issue a Final Report and such interim reports as he deems appropriate.[7]

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[4]The first three issues– fire, gunfire and pyrotechnic device– relate only to events occurring on April 19, 1993.

[5]The fourth issue, the use of the armed forces of the United States, encompasses events "leading up" to April 19, 1993. This language specifically permits Senator Danforth to investigate actions of the military that preceded April 19, 1993. Senator Danforth requested this language so that he could investigate allegations that the armed forces had operated inside the Branch Davidian complex prior to April 19, 1993.

[6]The fifth issue, the "coverup" issue, relates principally to activities that post-date April 19, 1993, although the Office of Special Counsel did investigate whether any actions of April 18 and 19, 1993, constituted an effort to cover up crime scene evidence of the initial ATF operation of February 28, 1993, an issue that is only marginally related to the Attorney General's Order. The Office of Special Counsel uncovered no evidence of acts committed by the FBI to cover up the events of February 28, so this Interim Report does not address that issue further.

[7]The Order further indicated that the provisions of 28 CFR §§ 600.4 through 600.10 would apply to the administration of the Office of Special Counsel. Note that certain provisions of the Special

II. Conclusions of the Special Counsel

The Office of Special Counsel has undertaken an exhaustive investigation into allegations of grave misconduct by employees of the United States government. In essence, the charges are that on April 19, 1993, federal agents caused the fire which destroyed the Branch Davidian complex and killed many Davidians who remained in it, directed gunfire at the complex, illegally employed the armed forces of the United States to assault the complex, and then covered up the alleged misconduct.

To date, the investigation has lasted ten months, employed 74 personnel, and cost approximately $12 million. The Office of Special Counsel has interviewed 849 witnesses, reviewed over two million pages of documents, and examined thousands of pounds of physical evidence. As a result of this effort, the Office of Special Counsel states the following conclusions with certainty:

The government of the United States and its agents are not responsible for the April 19, 1993, tragedy at Waco. The government:

(a) did not cause the fire;

(b) did not direct gunfire at the Branch Davidian complex; and

(c) did not improperly employ the armed forces of the United States.

Counsel regulations (28 CFR §§ 600.1-3) were omitted from the Charter. Senator Danforth believed that inclusion of these provisions would have indicated that his investigation was purely criminal in nature, which, at least arguably, could have prohibited the public disclosure of part or all of a written report. Instead, Senator Danforth negotiated language indicating that he intended to submit his report in a form that would permit, to the maximum extent possible, public dissemination of his findings.

Responsibility for the tragedy of Waco rests with certain of the Branch Davidians and their leader, David Koresh, who:

(a) shot and killed four ATF agents on February 28, 1993, and wounded 20 others;

(b) refused to exit the complex peacefully during the 51-day standoff that followed the ATF raid despite extensive efforts and concessions by negotiators for the Federal Bureau of Investigation ("FBI");

(c) directed gunfire at FBI agents who were inserting tear gas into the complex on April 19, 1993;

(d) spread fuel throughout the main structure of the complex and ignited it in at least three places causing the fire which resulted in the deaths of those Branch Davidians not killed by their own gunfire; and

(e) killed some of their own people by gunfire, including at least five children.

While the Special Counsel has concluded that the United States government is not responsible for the tragedy at Waco on April 19, 1993, the Special Counsel states with equal certainty that an FBI agent fired three pyrotechnic tear gas rounds at 8:08 a.m. on April 19, 1993, at the concrete construction pit approximately 75 feet from the living quarters of the Davidian complex. The pyrotechnic tear gas rounds did not start the fire that consumed the complex four hours later. The failure of certain government officials to acknowledge the use of the pyrotechnic tear gas rounds until August of 1999 constitutes, at best, negligence in the handling of evidence and information and, at worst, a criminal effort to cover up the truth. As more fully described below, the Special Counsel has made substantial progress in resolving the coverup issue, but the investigation is not yet complete.

The following sub-parts set forth the conclusions of the investigation to date. The Final Report will contain the conclusions to the open issues and any relevant supplemental information.

1. Did agents of the United States start or contribute to the spread of the fire that caused the death of Branch Davidians on April 19, 1993?

Government agents did not start or materially contribute to the spread of the fire. During the morning of April 19, 1993, several Davidians spread accelerants throughout the main structure of the complex, and started fires in at least three locations. The evidence indicates that many of the Davidians did not want to escape the fire.[8] Indeed, while government agents risked their lives to save Davidians from the fire, one Davidian tried to re-enter the burning complex to die. When an FBI agent questioned this Davidian regarding the location of the children, the Davidian refused to answer. A Davidian who exited the complex during the fire stated that he witnessed others make no effort to leave the complex. Another Davidian expressed remorse that she had not perished in the fire with the rest of the group.

The following evidence demonstrates that the Davidians started the fire:

(a) Title III Intercepts.[9] Davidian conversations intercepted through the use of concealed listening devices inside the complex from April 17 to April 19 indicate that the Davidians

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[8]There is evidence that structural debris, which resulted from an FBI vehicle breaching the complex, interfered with a potential escape route by blocking the trapdoor leading to an underground bus which was located on the west end of the complex. However, the breaching operations also created three avenues of possible exit at the base of the main tower, at the front door, and on the east side of the chapel.

[9]"Title III intercepts" are court authorized recorded interceptions of conversations, obtained through the use of concealed listening devices. The content of these Title III intercepts may be publicly released pursuant to order of the United States District Court for the Western District of Texas. In order to obtain accurate transcriptions of the recordings, the Office of Special Counsel utilized the assistance of both its retained expert and its own investigators.

started the fire. An April 17 intercept records Davidians discussing how they could prevent fire trucks from reaching the complex. An April 18 intercept records a conversation between Steven Schneider[10] and other Davidians indicating a conspiracy to start a fire. During that conversation, Schneider joked that another Davidian had always wanted to be a "charcoal briquette." Another Davidian stated that, "I know there's nothing like a good fire . . ." On April 19, between the beginning of the gas insertion operation at approximately 6:00 a.m. and approximately 7:25 a.m., the Title III intercepts recorded the following statements: "Need fuel;" "Do you want it poured?;" "Have you poured it yet?;" "Did you pour it yet?;" "David said pour it right?;" "David said we have to get the fuel on;" "We want the fuel;" "They got some fuel around here;" "Have you got the fuel . . . the fuel ready?;" "I've already poured it;" "It's already poured;" "Yeah . . . we've been pouring it;" "Pouring it already;" "Real quickly you can order the fire yes;" "You got to put the fuel in there too;" "We've got it poured already;" "Is there a way to spread fuel in there?;" "So we only light it first when they come in with the tank right . . . right as they're coming in;" "That's secure . . . we should get more hay in here;" "You have to spread it all so get started ok?" These statements precede the sighting of fire by several hours, which is further proof that the Davidians intended to set fire to the complex well in advance of actually lighting the fires.

Much closer to the time of the fire, from approximately 11:17 a.m. to 12:04 p.m., Title III intercepts recorded the following statements from inside the complex: "Do you think I could light this

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[10]An Office of Special Counsel investigator who has become familiar with Steven Schneider's voice through the review of known samples of Schneider's voice identified Schneider's voice in this conversation. This voice identification is confirmation of a prior voice identification made by an FBI Title III monitor who became familiar with Schneider's voice while monitoring Title III recordings throughout the standoff.

soon?;" "I want a fire on the front . . . you two can go;" "Keep that fire going . . . keep it."[11] The only plausible explanation for these comments is that some of the Davidians were executing their plan to start a fire.

(b) Admissions of Branch Davidians. Davidians who survived the fire have acknowledged that other Davidians started the fire. Graeme Craddock, a Davidian who survived the fire, told the Office of Special Counsel in 1999 that he observed other Davidians pouring fuel in the chapel area of the complex on April 19, 1993. He further stated that he saw another Davidian, Mark Wendel, arrive from the second floor yelling: "Light the fire." Davidian Clive Doyle told the Texas Rangers on April 20, 1993, that Davidians had spread Coleman fuel in designated locations throughout the complex, although he declined to state who specifically lit the fires.

(c) Statements of Government Witnesses. Observations by government witnesses support the conclusion that the Davidians started the fire. FBI agents who had the opportunity to observe activity within the Branch Davidian complex on April 19, using field glasses or spotting scopes, saw Davidians engaged in activity which they later concluded to be pouring fuel to start a fire. Some of these sightings were noted contemporaneously by the agents in FBI logs. Also, an FBI agent observed

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[11] These statements, which are intelligible on the enhanced versions of the Title III tapes, provide compelling evidence that the Davidians carefully planned and then systematically set the fire. The Office of Special Counsel also conducted a detailed investigation into allegations that the overhears should have prompted the FBI commander to call off the gassing plan when the FBI monitors heard the Title III intercepts indicating that the Davidians intended to start a fire. Having reviewed the tapes and interviewed the relevant witnesses, the Office of Special Counsel concludes that the intercepts were largely incomprehensible until the FBI later enhanced the tapes and, therefore, that the FBI agents monitoring the intercepts did not hear or understand the statements until after the fire.

an unidentified Davidian ignite a fire in the front door area of the complex shortly after noon. This observation was also reported contemporaneously.

(d) Expert Fire Analysis. Fire experts also agree that Davidians started the fire. The Office of Special Counsel interviewed the experts who performed the original, on-scene fire investigation and analysis. The Office of Special Counsel also retained two fire experts, one to review the work product of the previous investigators and to examine independently the photographic and physical evidence, and the other to analyze the spread of the fire throughout the complex. In addition, the Office of Special Counsel retained an expert to determine whether the tear gas, a combination of methylene chloride and ortho-chlorobenzylmalonitrile (commonly referred to as "CS gas"), reached concentration levels in the complex that were sufficiently high to have caused or contributed to the rapid spread of the fire.[12]

Relying upon photographs, records of previous on-site investigative activity (such as the use of an accelerant detection dog), physical evidence, computer models and Forward Looking Infrared ("FLIR") tapes, the experts concluded without question that people inside the complex started the fire in at least three places– the second floor of the southeast corner of the main structure of the

[12]The Office of Special Counsel also questioned federal agents who drove vehicles into the complex and shot tear gas into the complex to determine if they may have accidentally started the fire by knocking over a lantern or by other means. The Office of Special Counsel has determined that they did not start the fire, and Davidian Clive Doyle recently testified in the civil litigation between the United States and the Davidians and their families that there were no lit lanterns in the complex at the time of the fire.

complex, the stage area at the rear of the chapel, and the kitchen/cafeteria area.[13] The experts further concluded that the CS and methylene chloride did not start or contribute to the spread of the fire.[14] Finally, the Office of Special Counsel addressed the decision of the FBI to delay allowing firefighting equipment to arrive at the scene. The Office of Special Counsel has concluded that the Davidians were shooting at outsiders, which would have endangered the lives of any firefighters who approached the scene. In fact, a Title III intercept from April 17, 1993, records Davidians indicating that they intended to prevent firefighters from approaching the complex: "You're definitely right . . . I think all the time he knows it . . . nobody comes in here;" "Bring the fire trucks and they couldn't even get near us;" "Exactly." Furthermore, the evidence indicates that many of the Davidians did not want to leave the burning building.

(e) Medical Analysis. Autopsy and other medical reports on the victims of the fire provide additional information confirming that Davidians started the fire. For example, Raymond

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[13]The Attorney General's Order asked the Office of Special Counsel to determine not only if federal agents started the fire, but also whether they "contributed to the spread of the fire." Like the other parts of the Attorney General's Order, this portion of the Order was intended to refer to intentional wrongdoing by the government. As to whether government agents committed intentional wrongdoing which contributed to the spread of the fire, the answer is clearly no. The openings in the complex made by the Combat Engineering Vehicles ("CEV's") did allow for greater ventilation, which could have accelerated the spread of the fire in some areas, but they were made with the intent to create exits and to deliver gas. Moreover, the openings created by the CEV's, and the consequent accelerated spread of the fire, did not contribute to the deaths of the Davidians. In fact, in most cases, the openings made additional avenues of exit for the Davidians had they wanted to avoid the fire, and some Davidians in fact used these openings to escape the fire.

[14]The Office of Special Counsel also retained toxicology experts to assist in determining whether the CS or methylene chloride killed any Davidians. The Office of Special Counsel has concluded that the CS and methylene chloride did not kill any Davidians.

Friesen, a Davidian found deceased in the complex after the fire, had very high benzene levels in his system, which may be indicative of inhaling petroleum-based accelerants, and therefore is consistent with the theory that the Davidians spread fuel and started the fire. A surviving Davidian, Clive Doyle, had accelerants on his coat sleeves as well as burn wounds on his hands that the expert retained by the Office of Special Counsel believes to be consistent with wounds that would have occurred when his accelerant-soaked hands came in contact with a flame.

(f) Physical Evidence. The Office of Special Counsel and its experts conducted a detailed review of the physical evidence that relates to the fire. During its review, the Office of Special Counsel located Coleman and other fuel cans containing numerous puncture marks. Expert tool mark examiners confirmed that someone had deliberately punctured several of the cans– a common tactic among arsonists who wish to spread fuel. Investigators also found a handmade torch among the debris in the kitchen/cafeteria, one of the fire's points of origin. Canine searches from 1993, confirmed by later lab analysis of portions of the remains of the building, identified accelerants in areas where the FLIR tapes and other evidence indicate that the fires started. Lab analysis also found accelerants on clothing and shoes of Davidians.

(g) Beliefs of the Davidians. The teachings of Koresh are consistent with the overwhelming eyewitness and physical evidence that the Davidians started the fire. The Office of Special Counsel interviewed Davidians, religious experts and writers to determine whether the Davidians would start a fire for any reason. Based on these interviews, the Office of Special Counsel concluded that the Davidians considered death by fire justified– even desirable– under circumstances in which they were under attack by forces that they considered to be evil, including the government.

Koresh taught the Davidians that fire would "transcend" or "translate" them immediately to heaven. Davidian survivors Marjorie Thomas and Graeme Craddock specifically recalled Koresh teaching that fire is an acceptable means of death for Davidians. Thomas remembers Koresh stating during Bible study that fire would transcend the Davidians to heaven during the "battle" with Babylon, and that Koresh considered the U. S. government to be Babylon. Davidian Kathy Schroeder recalled that, shortly after the confrontation with ATF on February 28, 1993, Koresh told the Davidians that he had a dream that the Davidians would burn in a great fire, their skin would burn off, and they would "transcend" to heaven. Consistently, Davidians referred to their complex as "Ranch Apocalypse" and on April 16, 1993, several federal agents observed a Davidian hold a sign outside a window of the complex that read "the flames await: Isaiah 13."

An alternative explanation, that of Dr. J. Phillip Arnold of Houston's Reunion Institute, is that Koresh may have ordered the Davidians to set the fires as protection from government forces in a manner similar to the protection discussed in the Book of Daniel, with the story of Shadrach, Meschach and Abednego in the fiery furnace. Dr. Arnold further stated that Koresh and the Davidians would not have run from the fire, but rather may have viewed the fire as a fulfillment of prophecy.

Whether the Davidians set the fires to cause their deaths and transcend to heaven, or set them in an attempt to create a shield of fire, once the fire was set, it became a fulfillment of Koresh's prophecy, and, in accordance with his religious teachings, was an acceptable and even desirable way of dying for the Davidians. Consequently, there exist strong bases in the Davidians' religious beliefs and conduct to support the conclusion that the Davidians started the fire on April 19, 1993.

As the foregoing discussion indicates, the evidence is conclusive that the Davidians started the fire. While actions of the government may have contributed incidentally to the spread of the fire, these actions (or inactions) did not cause the tragic loss of life on April 19, 1993. The Special Counsel will provide expert reports and additional evidence supporting his fire conclusions in the Final Report.

2. *Did agents of the United States direct gunfire at the Branch Davidian Complex on April 19, 1993?*

No employee of the United States fired a gunshot at the Branch Davidian complex on April 19, 1993.[15] To the contrary, while the Davidians fired upon government agents throughout the morning of April 19, government agents did not return gunfire. Indeed, the FBI had the authority to return fire under the law and its deadly force policy, but did not do so.

In arriving at these conclusions, the Office of Special Counsel relied upon the following evidence:

(a) FLIR Testing and Analysis. Virtually the only evidence cited by those claiming government agents fired shots into the complex on April 19, 1993, are the FLIR videos recorded by the FBI Nightstalker aircraft from approximately 10:42 a.m. to 12:41 p.m. on that day. In fact, however, this evidence strongly supports the conclusion that no employee of the United States fired a shot on April 19.

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[15]For the purposes of this report, the term "gunshot" does not encompass the firing of tear gas from M-79 grenade launchers, which occurred repeatedly at Waco on April 19, 1993.

The FLIR tapes show 57 flashes, emanating principally from alleged Davidian positions inside or on top of the complex. Eighteen of the flashes occur on the back side of the complex, with some occurring around government vehicles that were operating near the complex. During the past three years, representatives of the Davidians and several independent experts retained by the media and Congress have concluded that gunfire could have caused or did cause these flashes. The FBI and its experts have claimed that the flashes are reflections or "glint" coming from debris scattered in and around the complex.

The Office of Special Counsel retained two teams of experts to analyze the FLIR tapes from April 19. Working with the United States District Court judge in the civil litigation brought by some of the Davidians and their families against the United States government, the Office of Special Counsel and its expert, Vector Data Systems (U.K.) Ltd., conducted a field test of FLIR technology at Fort Hood, Texas on March 19, 2000. The purpose of the test was to identify the thermal signature, if any, that gunfire and debris would leave on a FLIR recording. The Office of Special Counsel conducted the test under a protocol agreed to and signed by both the attorneys and experts for the government and the attorneys and experts for the Davidians and their families. The protocol identified the FLIR equipment, the weapons, and the other conditions that would best approximate the scene at Waco in 1993.

Based on a detailed analysis of the shape, duration and location of 57 flashes noted on the 1993 FLIR tapes, and a comparison of those flashes with flashes recorded on the March 2000 FLIR test tape, the expert retained by the Office of Special Counsel concluded with certainty that each of the flashes noted on the 1993 tapes resulted from a reflection off debris on or around the complex.

These conclusions are supported by color photographs which show the reflective debris at the exact location of many of the flashes noted on the 1993 tapes. Lena Klasèn, a second independent expert retained by the Office of Special Counsel also concluded that thermal activity caused by human movement or motion did not exist near or around the area of the flashes noted on the FLIR tapes. Moreover, she concluded that photographs show no people at the points from which the flashes emanated. After performing a relational analysis of the Nightstalker's movement and sensor position, Klasèn, like Vector, has concluded that the flashes on the 1993 tapes were from debris. The FLIR test and the expert analyses prove conclusively that the FLIR tapes do not evidence gunfire directed at the Davidians from government positions.

(b) Ballistics Testing. The ballistics expert retained by the Office of Special Counsel further supports the conclusion that there was no government gunfire on April 19, 1993. The Office of Special Counsel conducted ballistics testing on 36 shell casings found at the "Sierra-1" government sniper position to determine if FBI agents fired these shots. The expert concluded with certainty[16] that these casings came from weapons the Office of Special Counsel identified as ATF weapons fired on February 28, 1993.[17] The casings do not, therefore, evidence FBI gunfire on April 19.

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[16]After the Office of Special Counsel conducted the ballistics tests, counsel for the parties in the civil litigation also conducted similar testing. Experts for both the plaintiffs and the defendants reached identical conclusions– that the shell casings from the Sierra-1 sniper position did not match the FBI weapons of April 19. As a result, counsel for the Davidians in the civil litigation dropped their claims against FBI sniper Lon Horiuchi, who had been stationed at Sierra-1.

[17]The Office of Special Counsel could not test four additional shells found near Sierra-1 (three .45 caliber and one .22-250 caliber). The casings appeared to be old, predating the standoff, and not of the manufacture or caliber utilized by the FBI or ATF.

(c) Statements of Davidian Witnesses. The interviews of Davidians further establish that no government agent fired on April 19. The Office of Special Counsel interviewed 13 Branch Davidians, six of whom were in the complex on April 19, 1993.[18] Attorneys and investigators for the Office of Special Counsel questioned each of these witnesses in detail about the standoff. None of the Davidians who were in the complex on April 19 indicated that he or she saw or heard government gunfire, nor did any Davidian provide other evidence that the government fired at the complex or at the Davidians.

The evidence indicates that the Davidians who died from gunfire either committed suicide or were shot by other Davidians. One surviving Davidian, Kiri Jewell, testified before Congress that Koresh had taught her how to use a gun to kill herself. Moreover, Dena Okimoto, a former Davidian, reported to the government on March 3, 1993, that Koresh had instructed his followers that, if he died before they did, the women should kill themselves or receive assistance from the men, who were to go on a shooting spree before they died. Title III intercepts indicate that on March 16, 1993, a Davidian, possibly Koresh, discussed committing suicide by shooting himself. These statements further support the conclusion that the Davidians shot themselves and did not die as the result of government gunfire.

(d) Statements of Government Witnesses. The United States government has maintained consistently since April 19, 1993, that no government agent fired a single shot at the

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[18]A total of nine Branch Davidians survived the fire but only six of them agreed to speak with the Office of Special Counsel.

Davidian complex on April 19. Every government witness interviewed by the Office of Special Counsel confirmed this contention. The Office of Special Counsel conducted detailed interviews with federal government personnel who were in the vicinity of the complex on April 19, 1993, or otherwise involved with the Waco incident. These included 472 FBI personnel, four United States Secret Service agents, 35 ATF agents, and 82 members of the active duty armed forces of the United States, including members of the Army Special Forces. The Office of Special Counsel also interviewed state and local government officials, including 27 members of the Texas and Alabama National Guards, and 38 Texas Rangers. The Office of Special Counsel informed certain key witnesses that the charter of the Office of Special Counsel permitted criminal prosecution of anyone who lied to representatives of the Office of Special Counsel, and, where appropriate, that the Office would in fact prosecute any person found to have made false statements to its investigators.

Office of Special Counsel attorneys and investigators asked government representatives who were present at the complex on April 19 (or otherwise involved in the Waco confrontation) not only whether they fired weapons, but also whether they saw any other government person fire a weapon, and whether they even heard discussion or rumor that any government agent engaged in gunfire. Not a single one of the hundreds of government witnesses stated that he or she had any knowledge suggesting that any government agent fired at the Davidians on April 19.

Numerous government witnesses did, however, see or hear gunfire emanating from the complex toward government positions at various times during the morning of April 19. In addition, shortly after the start of the fire, at least four witnesses heard rhythmic bursts of gunfire coming from within the complex, which is consistent with the conclusion that the Davidians were deliberately shooting

each other. The eyewitness accounts of government personnel, therefore, indicate that the government did not fire at the Davidians, but that the Davidians fired at the government and shot themselves.

(e) Statements of other people claiming that the government engaged in gunfire. Several other parties have claimed that the government engaged in gunfire on April 19, but none of them provided credible evidence to support this contention. The Office of Special Counsel interviewed filmmakers, writers, and advocates for the Davidians. None of them had witnessed any government gunfire on April 19. Further, none of them provided evidence supporting their contention of government gunfire on April 19, other than the flashes that appear on the 1993 FLIR tapes and the shell casings found at the Sierra-1 sniper position.[19] As stated above, the FLIR tapes and shell casings do not provide evidence of government gunfire on April 19.

(f) Polygraph Testing. Polygraph testing reinforces the conclusion that no government agent fired a shot on April 19.[20] During the course of conducting classified interviews with members of the Army Special Forces, the Office of Special Counsel obtained conflicting information on the exact whereabouts of one Army Special Forces member who was at Waco on April 19, 1993, although no witness suggested that this soldier had entered the perimeter of the complex or fired a weapon. This conflicting testimony also surfaced in the civil litigation between the Davidians and their families and the government, which led to speculation among counsel for the Davidians and their families

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[19]Some of them provided names of alleged witnesses but either those witnesses could not be located because too little information was given to find them or the information provided by the witnesses did not support the contention that the government fired into the complex on April 19.

[20]In instances where conflicts in testimony occurred, or where there was no other corroborative evidence, the Office of Special Counsel made limited use of polygraph testing.

and the press that this individual may have fired a weapon into the complex. Consequently, the Office of Special Counsel engaged the services of two polygraph examiners from the United States Postal Inspection Service to help determine whether this individual had entered the perimeter of the complex at any time or fired a weapon on April 19. These examiners concluded that this individual was "not deceptive" in saying that he neither entered the perimeter nor fired a weapon at the complex on or before April 19.

(g) Document Review. The Office of Special Counsel has reviewed an extensive documentary record relating to events of April 19, 1993. The documents have included FBI sniper logs, FBI "302" memoranda of interviews, and handwritten notes of meetings. Only one document– a June 2, 1993, FBI 302 memorandum of an interview of FBI Special Agent Charles Riley– contained a statement[21] that could be interpreted to mean that a government agent fired on the complex. When interviewed, Riley stated to the Office of Special Counsel that the FBI 302 (which he did not author and did not review at the time) should have stated only that he heard agents stationed at Sierra-1 report gunfire emanating from the complex. Riley noted further that he had corrected the June 2, 1993, 302 memorandum by authoring his own 302 memorandum on November 19, 1996, after the FBI brought the erroneous statement to his attention.[22] Consistently, FBI logs of the activity on April 19 indicate no government gunfire, but they record numerous instances of Davidian gunfire.

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[21]The 302 states: "SA Riley related that he heard shots fired from Sniper 1 position."

[22]The author of the Riley 302 also told the Office of Special Counsel that she may have misinterpreted what Agent Riley said when she drafted it. Moreover, the FBI 302's of the other agents who were with Agent Riley at the Sierra-3 sniper position on April 19 make no mention of government gunfire.

(h) Videos, Photographs and Recordings. The videos taken by witnesses and the media on April 19 do not indicate government gunfire.[23] None of the thousands of photographs from April 19 shows people in the places from which government gunfire allegedly emanated.[24] The Title III intercepts do, however, contain sounds that may be consistent with Davidians firing at government agents from within the complex.[25] Video taken by an FBI agent also contains audible evidence of gunfire coming from inside the complex at the time of the fire.

(i) Autopsy/Pathology Results. Autopsy reports and anthropological work support the conclusion that those Davidians who died of gunshot wounds were killed by other Davidians, not by the government. The 1993 pathology studies concluded that at least 20 Davidians[26] were shot and one was stabbed[27] on April 19. According to the anthropological work, five of the victims were children under the age of 14. The 1993 studies indicated that many of those who died of gunshot injuries were

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[23]The film *Waco: A New Revelation* portrays video of a helicopter allegedly shooting at the complex on April 19. Vector Data Systems (U.K.) Ltd., the Office of Special Counsel's independent expert, has determined that the flashes shown in the film are merely reflected sunlight, and that the helicopter doors were not even open to permit gunfire from the aircraft.

[24]During the civil litigation, an issue arose as to the authenticity of certain photographic and video evidence. The Final Report will discuss these allegations in the "coverup" section.

[25]Gunfire at close range to a Title III intercept device will mute all sound from the intercept microphone for a brief period of time. Many such "mutings" occur on the intercept recordings. In fact, at 6:07 a.m., the same time HRT reported receiving gunfire from the complex, the Title III listening devices recorded these mutings inside the complex.

[26]The figure "at least 20" is used because the forensic pathologists could not rule out gunshot injuries for several of the Davidian adults and children due to the extensive damage to their bodies by the fire.

[27]The only stabbing victim, three year old Dayland Gent, was stabbed in the chest.

shot in the head or mouth, which is consistent with suicide or execution by the Davidians. Furthermore, information provided to the Office of Special Counsel by those who conducted the 1993 studies indicates that none of the Davidians was shot with a high velocity round[28] on April 19, which would be expected had they been shot from outside of the complex by government sniper rifles or other assault weapons.

The Office of Special Counsel tested these conclusions thoroughly. While the bodies of the deceased Davidians are no longer available to be examined, the Office of Special Counsel did retain a forensic pathologist with specific expertise in gunfire deaths to conduct a thorough review of the 1993 autopsy reports, the extensive photographic and X-ray record from the initial pathology studies, the DNA findings, and the anthropological work of the Smithsonian Institution on the Davidians' remains. The Office of Special Counsel also interviewed the members of the 1993 pathology team. Based upon this expert analysis and interviews with the original pathology team and the anthropologists from the Smithsonian Institution, the Office of Special Counsel has confirmed that 20 Davidians died of gunshot wounds on April 19. While it is impossible to determine what type of round killed some of the victims, several of the Davidians who died on April 19 had residual evidence indicating that they had been shot with low velocity rounds, either within inches of or in contact with their heads. None of the Davidians who died on April 19 displayed evidence of having been struck by a high velocity round. The expert retained by the Office of Special Counsel concluded that many of the gunshot wounds are "consistent

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[28]Dr. Doug Owsley of the Smithsonian Institution informed the Office of Special Counsel that none of the gunshot injuries to the head exhibited evidence of the damage which would be caused by "high velocity rounds."

with suicide or consensual execution (suicide by proxy)." Therefore, the autopsy evidence, while not conclusive as to the gunfire issue for all victims, fully supports the theory that the Davidians shot themselves.

(j) Tactical Analysis. The Office of Special Counsel also discussed with several witnesses the tactical implications of the allegations that government agents fired guns on April 19 in the manner alleged. The allegations are that government agents exited their armored vehicles in close proximity to the complex, thereby exposing themselves to Davidian gunfire from fortified and elevated Davidian positions within the complex. To have done so would have unreasonably and unnecessarily risked the agents' lives. For example, FBI snipers at one point observed a .50 caliber weapon high in the tower trained directly on their sniper position. As one FBI agent said, being on foot without the cover of an armored vehicle on April 19 under such circumstances "would be sheer madness."

(k) Lack of Evidence of Ill Motive. The theory that the government deliberately shot or otherwise harmed the Davidians runs contrary to the overwhelming evidence, before, during, and after the fire, that the government officials occupied themselves with resolving the standoff in a peaceful manner that would preserve life if at all possible. FBI agents negotiated patiently with the Davidians for 51 days. They developed their tactical plan with input from behavioral psychologists and doctors whose paramount concern was the safety of the children in the complex. They had doctors located at forward positions near the complex on April 19, including a doctor at the Sierra-2 sniper position and additional medical support at a location near the intersection of roads (the "T-intersection") outside the complex, waiting to provide the Davidians medical assistance. The FBI also set up a field hospital.

Military doctors and law enforcement medics treated all nine of the Davidians who escaped on April 19.

One FBI agent even risked his life by going into the complex to rescue a Davidian who had exited and then ran back into the burning complex. The Davidian resisted the agent's efforts to pull her from the fire, but the agent did save her. Former FBI Director William Sessions provided compelling testimony before Congress in 1993 describing the acts of FBI agents, not only in rescuing Davidians from the burning complex, but also in attempting to rescue Davidians whom the FBI hoped had escaped into an underground bus near the complex. Agents, including HRT commander Richard Rogers, waded into the concrete construction pit, waist deep in water containing human waste and rats, in an unsuccessful effort to find children in the bus. It is simply not credible to suggest that while agents on the front side of the complex were risking their lives to rescue the Davidians, other agents on the back side were shooting at them to pin them in the burning structure.

In summary, those claiming that government gunfire did occur have presented an unsupportable case based entirely upon flawed technological assumptions. The FLIR tapes and testing, witness interviews, including those of Davidians, documentary evidence, audio and video evidence, photographs, autopsy reports, polygraph examinations, ballistics testing, and basic tactical and behavioral considerations provide conclusive evidence that no agent of the United States fired gunshots at Waco on April 19, 1993.[29]

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[29]During the late afternoon or early evening hours of February 28, Davidians Michael Dean Schroeder, Norman Allison and Woodrow Kendrick, attempted to gain entry into the Mt. Carmel

The eyewitness evidence and physical evidence are equally overwhelming that the Davidians shot repeatedly at the government on April 19 and that 20 Davidians either committed suicide or were shot by other Davidians as the fire broke out just after noon on April 19. The Office of Special Counsel will provide expert analysis of the evidence supporting its conclusions regarding gunfire in its Final Report.

3. Did agents of the United States use an incendiary or pyrotechnic device at the Branch Davidian complex on April 19, 1993?

An FBI agent shot three pyrotechnic military tear gas rounds at the plywood covering of the concrete construction pit[30] on the west or "green" side of the complex at approximately 8:08 a.m.

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complex. They approached the complex from the rear or black side of the complex in an area commonly referred to as the Perry Barn or Perry Barn catch pen. The Davidians were confronted by a group of 14 ATF agents who were attempting to withdraw from the area. A shootout ensued during which Schroeder fired at least 18 shots at the agents. Schroeder was killed, Allison was arrested, and Kendrick escaped. Since the death of Schroeder, allegations have been made that Schroeder may have been wounded during the initial shootout and subsequently executed by ATF agents before the agents completed their withdrawal. The theory of Schroeder's execution is based upon the claim that Schroeder died from two gunshot wounds to the back of the skull. A review of the autopsy results of Schroeder by an expert retained by the Office of Special Counsel does not support this claim. Although Schroeder suffered two entry gunshot wounds to the skull, both wound tracks indicate Schroeder was facing forward at the time he was shot, which is consistent with a gun battle, not an execution. The two entry wounds are in the front of his head. The projectiles exited from the rear of his head. The autopsy results support the statements and subsequent criminal trial testimony of the ATF agents involved in this confrontation and are not, therefore, indicative of the alleged execution-style shooting.

[30]This structure is alternatively referred to as a construction pit and a tornado shelter by many commentators and witnesses. Some also refer to it as a bunker, which has a tendency to confuse this structure with the storage area below the tower inside the complex, which is also referred to as a bunker by numerous sources. For the purposes of this report, the Office of Special Counsel will refer to the structure at which the FBI fired military tear gas rounds as the concrete construction pit and the storage area within the complex as the concrete bunker.

on April 19, 1993.[31] The rounds failed to penetrate the covering, bounced off, and landed harmlessly outside the living quarters of the complex. There is no evidence that any government agent fired a pyrotechnic device at the living quarters of the Davidians, nor is there any evidence that any government agent fired pyrotechnic devices after 8:08 a.m. Because the FBI fired the pyrotechnic tear gas rounds nearly four hours before the fire started, at a concrete construction pit partially filled with water, 75 feet away and downwind from the main living quarters, it is certain that the pyrotechnic tear gas rounds did not start or contribute to the spread of the fire. In support of these conclusions, the Office of Special Counsel relied upon the following evidence:

(a) Witness Interviews and Statements. Members of the FBI's Hostage Rescue Team ("HRT") have repeatedly acknowledged that one member of the HRT fired pyrotechnic tear gas rounds on April 19 in an attempt to penetrate the concrete construction pit. In November 1993, the agents who knew that the rounds had been fired discussed their use with the Department of Justice trial team which was preparing to prosecute certain of the surviving Davidians. The interview notes taken and trial summaries prepared by trial team members clearly reflect discussion of "military" tear gas rounds fired at the concrete construction pit. The notes reflect that one witness described these rounds (incorrectly) as incendiary. Also in 1993, an FBI pilot told investigators preparing a report to the

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[31]The rounds were pyrotechnic but not incendiary. An incendiary round is designed to start a fire. A pyrotechnic round is not designed to start a fire, but contains a composite of materials which burn, creating heat which can start a fire under certain conditions. The FBI has recently advanced an argument that military tear gas rounds of the type fired by the FBI at the concrete construction pit on April 19, 1993, are not pyrotechnic. Because this tear gas was delivered with a charge that burns, the Office of Special Counsel rejects the FBI's contention. Military tear gas rounds are clearly pyrotechnic in nature, as numerous government documents (including the FBI's own Manual of Investigative Operations and Guidelines) and witnesses acknowledge.

Deputy Attorney General that he had heard radio transmissions on the morning of April 19 discussing the use of a "military round" at the concrete construction pit. In February 1996, the HRT again confirmed the use of pyrotechnic military tear gas rounds in response to an inquiry from the FBI's Office of General Counsel made during the course of the civil case brought by the Davidians and their families against the government. In 1999 and 2000, HRT agents openly acknowledged using the military tear gas rounds to the Office of Special Counsel.

(b) Photographic and Video Evidence. News footage obtained by the Office of Special Counsel shows FBI Special Agent David Corderman firing pyrotechnic tear gas rounds at the concrete construction pit on the west side of the complex. Film and video footage show a white cloud of tear gas emanating from the area around the concrete construction pit immediately thereafter. An aerial photograph also shows a white cloud around the concrete construction pit, which is a distinctive feature of the type of pyrotechnic tear gas round fired by the HRT. The FLIR tapes contain audio of the conversation at 7:48:52 a.m. in which HRT commander Rogers gave permission to fire these rounds and the conversation at 8:08:59 a.m. in which the HRT Charlie Team Leader notified Rogers that a member of his team had fired rounds, which had hit the concrete construction pit and bounced off. All of these sources indicate that the FBI fired the pyrotechnic rounds early in the morning away from the living quarters of the complex.

(c) Physical Evidence. The Texas Rangers placed one expended military tear gas shell casing which they found during the crime scene search in an evidence locker which the Rangers maintained until the United States District Court for the Western District of Texas ordered the transfer of the evidence to the federal courthouse at Waco. A Texas Department of Public Safety

photographer took a photograph of an expended military tear gas projectile on April 30, 1993. This projectile is missing,[32] but the photograph is with the Rangers' evidence at Waco. In addition, FBI explosives expert Wallace Higgins told the Office of Special Counsel that he saw two other pyrotechnic tear gas projectiles on or about April 20, 1993,[33] adjacent to the concrete construction pit. None of the three projectiles was logged into evidence by the Rangers, and the Office of Special Counsel has not located them.

(d) Polygraph Testing. Special Agent Corderman voluntarily submitted to and passed a polygraph test. The testing confirmed the Office of Special Counsel's conclusion that Agent Corderman was truthful in saying that he fired pyrotechnic tear gas rounds only at the concrete construction pit and not at the living quarters of the complex.

(e) Shaped Charge Allegation. The Office of Special Counsel also investigated allegations made by a filmmaker and a former United States Army Special Forces soldier (who was not at Waco on April 19, 1993) that government operatives allegedly entered the complex and placed explosive devices, known as shaped charges, on the concrete bunker at the complex and the propane tank near the tower. Those alleging that the government placed the shaped charges within the complex claim that the massive explosion that occurred during the fire at 12:26 p.m. on April 19 was the

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[32]The photographer's log indicates that the evidence search team originally found the projectile approximately 200 yards northwest of the water tower, a location consistent with Corderman's description of the angle at which he shot.

[33]The spent cartridge, which would likely be found near the site where it was fired, is commonly called a "shell" or a "shell casing." The used "projectile" would be found near the target. In this report, the Office of Special Counsel will use the term "round" to describe the whole device, the term "shell" to describe the spent cartridge, and the term "projectile" to describe what is actually shot at the target.

detonation of one of the shaped charges. They also point to photographs taken after the fire which show a hole in the roof of the concrete bunker, which they claim resulted from the detonation of the shaped charge.

The Office of Special Counsel found these allegations totally meritless. Experts retained by the Office of Special Counsel concluded that the explosion seen at 12:26 p.m. is a propane tank exploding due to heat from the fire. Ignoring the near tactical impossibility of placing shaped charges at the locations alleged, the Office of Special Counsel and its experts analyzed the physical evidence relating to the hole in the concrete bunker and determined: (1) the debris remaining near the hole in the roof is inconsistent with the use of shaped charges or similar highly explosive devices, (2) none of the bodies recovered from the bunker presents evidence of a blast injury, (3) the metal rebar from the bunker is not covered with residue from a shaped charge, and (4) fragments from hand-grenades (which the Davidians had in their arsenal) are spread across the roof of the concrete bunker. Based upon this, and other evidence, the Office of Special Counsel and its experts concluded that the hole in the concrete bunker was caused by a combination of heat damage and a low-order grenade detonation. The grenade detonation was also caused by the heat of the fire. Significantly, counsel for the families of the Davidians who perished on April 19 did not make the allegation that the government used shaped charges against the Davidians.

The Final Report of the Special Counsel will contain expert reports and other information concerning the Special Counsel's conclusions with respect to the use of pyrotechnic or incendiary devices by the government at Waco on April 19, 1993.

4. Was there any illegal or improper use of the armed forces of the United States in connection with events leading up to the deaths of the Branch Davidians on April 19, 1993?

The Office of Special Counsel investigated allegations that members of the armed forces of the United States violated the law by participating directly in the Waco law enforcement operation. Allegations made against the armed forces included claims that its members shot at the Davidians from helicopters on February 28, 1993, infiltrated the complex during the standoff, placed explosive devices in the complex, offered to kidnap Koresh, and shot at the Davidians from positions around government vehicles on April 19, 1993. These allegations proved entirely meritless.

The armed forces of the United States[34] did not violate any civil or criminal statute in connection with their activities at Waco in 1993. While the armed forces of the United States provided extensive support for law enforcement agencies, including reconnaissance, equipment, training, advice, and medical assistance, they were careful in their conduct and well-advised legally as they determined exactly what support to provide. In fact, in at least two instances, law enforcement agencies solicited assistance from the armed forces that the armed forces either rejected or scaled back due to concern about remaining within the bounds of federal law.

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[34]The phrase "armed forces of the United States" customarily does not include the National Guard unless ordered into federal service, which did not occur at Waco. However, the Office of Special Counsel has chosen to read "armed forces of the United States" to include "armed forces of a state of the United States" so as to give the American public complete disclosure of military activity at Waco.

The primary issue with respect to the armed forces is whether the use of the active duty[35] military violated the *Posse Comitatus* Act, 18 U.S.C. §1385, which prohibits the use of the Army "as a *posse comitatus* or otherwise to execute the laws." The *Posse Comitatus* law arose out of post-Civil War concerns that the armed forces had become an instrumentality of federal law enforcement in the occupied southern states. The overriding purpose of the legislation was to preclude the military from direct participation in arrests, searches and seizures. While the law establishes the important principle of separation of civil and military actions, it has never been the basis of a successful prosecution. The *Posse Comitatus* Act does not prohibit all military support to civilian law enforcement, but only support that directly involves the military in law enforcement functions. Supplementing the *Posse Comitatus* Act, the Military Assistance to Law Enforcement Act, 10 U.S.C. §§ 371-378, precludes direct participation by active duty forces in searches, seizures, and arrests, but permits indirect support to law enforcement operations such as loaning equipment, training in the use of the equipment, offering expert advice, and providing equipment maintenance. These laws do not apply to the National Guard unless it is federalized by being ordered to active duty by the President.

In arriving at its conclusions regarding the use of the armed forces at Waco, the Office of Special Counsel considered the legality of armed forces support in five principal areas: (a) operations support, (b) equipment, (c) training, (d) expert advice, and (e) National Guard.

(a) Operations Support. In its investigation of the active duty military, the Office of Special Counsel focused on the level of participation by military personnel in law enforcement

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[35]The term "active duty" means full-time duty in the active military service of the United States. See 32 U.S.C. §101(12).

operations. In concluding that all active duty military support was legal, the Office of Special Counsel analyzed the support provided during three time periods: (1) preparation for the ATF operation of February 28, 1993, (2) the 51-day standoff, and (3) the activities of April 19, 1993.

1. Pre-February 28, 1993. Members from a detachment of the Rapid Support Unit ("RSU"), Operational Detachment "Alpha" 381 ("ODA 381"), which was comprised of nine U.S. Army Special Forces soldiers, provided assistance to ATF during its training at Ft. Hood, Texas, during February 1993. Specifically, ODA 381 reserved a facility at Ft. Hood that represented the complex, constructed a portable door entry and a reusable window for the facility, outlined part of the Davidian complex with engineering tape using photographs, facilitated the use of the ranges at Ft. Hood, and served as human "silhouettes" of Davidians during ATF room-clearing exercises. This support is "indirect" military assistance that is within the bounds of applicable law and regulations.

In addition, the Office of Special Counsel has investigated the allegation that members of ODA 381 were present during the ATF's attempt to execute warrants at the Davidian complex. The Office of Special Counsel has concluded that no member of ODA 381 was present during the ATF's raid of the Branch Davidian complex. The evidence, including witness statements, a travel voucher, and a hotel receipt, indicates that four members of ODA 381 were late returning to McGregor Range, New Mexico, due to a flat tire and a severe thunderstorm and not because they had disobeyed orders and become participants in the ATF raid.

2. Support During the Standoff. Most of the active duty military support provided to the FBI during the 51-day standoff consisted of repair and maintenance of the equipment loaned to the FBI. This type of operations support is clearly legal. Generally, FBI personnel brought equipment to

rear positions around the complex for repair and maintenance, or in the case of the loaned military helicopters, the FBI brought the helicopters to Ft. Hood. However, on at least two occasions military personnel deviated from this standard procedure. On one occasion, a tank driven by an FBI agent broke down within sight of the Davidian complex, and some of the tank's maintenance crew drove in a Bradley vehicle to its location to correct the problem. On the other occasion, a member of the Army Special Forces went to a forward position to help replace a battery in surveillance equipment the FBI had placed on a water tower on the east side of the complex. These deviations from the standard procedure did not constitute a "direct role" in law enforcement operations and the actions were, therefore, within the bounds of the law.

Throughout the standoff and on April 19, 1993, members of the Army Special Forces were at Waco as observers and technicians. During the standoff there were a total of 10 Army Special Forces personnel– seven equipment technicians and three observers– present at Waco. Typically, there were three or four present at any one time, one or two of whom were observers. The main purpose of the observers was to allow the Army Special Forces to learn how the FBI conducted a barricaded hostage operation using Special Forces equipment. Despite allegations to the contrary, the Office of Special Counsel has concluded that these Army Special Forces personnel did not penetrate the Davidian complex, did not offer to kidnap Koresh, did not place a shaped charge in the complex, did not wear clothing immune to infrared or thermal imaging detection, did not fire any weapons into the complex (and were not even armed), did not run their own separate Tactical Operations Center ("TOC"), and did not engage in any other action that violated the *Posse Comitatus* Act or any other

criminal or civil statute. The Army Special Forces observation and equipment maintenance activities were well within the bounds of the law.

3. April 19 Support. The only active involvement of the military in the FBI operations on April 19, 1993, was to provide medical support to injured Davidians and government personnel. Several former Army lawyers expressed to the Office of Special Counsel some reservation about the propriety of the medical support provided by the active duty armed forces on April 19, because, by treating Davidians who may have been involved in the fire, military doctors may have become involved in crime scene activity and the chain of custody of evidence. Indeed, such reasoning may have been behind the decision to preclude Army Special Forces medics from being present during the ATF operation on February 28. Nevertheless, the Office of Special Counsel concludes that the humanitarian provision of medical support did not violate any law. To the contrary, such support is justifiable within the relevant law, military regulations and policy.

(b) Equipment Support. From the evening of February 28 until after the fire on April 19, law enforcement agencies solicited and received large amounts of military equipment from the armed forces, including the United States Army Special Operations Command and the United States Air Force. The equipment included, among other things, two tanks, a transport aircraft, helicopters, ammunition, surveillance "robots," classified television jamming equipment, classified thermal imagers, classified ground sensing systems, classified remote observation cameras, mine detectors, search lights, gas masks, night vision goggles, concertina wire, tents, cots, generators, and medical supplies. In the case of the two tanks, among other equipment, the military commanders required that the offensive capability of the equipment be disabled before providing it to the law enforcement agency. While the

level of support was extensive, there is no legal restriction on the amount of equipment the active duty military may supply civilian law enforcement agencies, provided that the level of support does not adversely affect national security or military preparedness. Since providing equipment to the FBI at Waco did not adversely affect national security or military preparedness, it was proper under the law.[36]

(c) Training of Law Enforcement Personnel. The active duty military provided training to law enforcement agencies both prior to and during the standoff stages of the Waco incident. Most of the training occurred in three discrete areas: (1) training of ATF personnel by a detachment of the RSU, ODA 381, prior to February 28, 1993, (2) training of FBI personnel in the use of unclassified equipment such as tanks and other vehicles during the 51-day standoff, and (3) training of FBI personnel by Army Special Forces personnel in the use of classified surveillance equipment during the 51-day standoff.

The relevant statutes[37] and Department of Defense directive[38] permit the active duty armed forces to train law enforcement personnel, but the directive precludes "large scale" or "elaborate" training.[39] In February 1993, ATF requested extensive training from the active duty military in several areas, including close quarters battle training. Due to the law, military regulations and policy, the active duty armed forces scaled back the training requested by ATF. ODA 381 refused to provide

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[36]10 U.S.C. § 372(a).

[37]10 U.S.C. § 373(1); P.L. 101-510, div. A, title X, § 1004(b)(5).

[38]DoD Directive 5525.5, paragraph E4.1.4.

[39]The Office of Special Counsel found no established standard for what qualifies as "large scale" or "elaborate" training.

the close quarters battle training[40] requested by ATF because such training is highly complex and was beyond the capabilities of the RSU at that time. The armed forces properly limited the areas of training to range safety, communications, and medical evacuation. With respect to the training of FBI agents in the use of military vehicles and classified surveillance equipment during the 51-day standoff, such training is explicitly permitted under the relevant laws and regulations and was, therefore, proper.

(d) Expert Advice. The active duty armed forces of the United States provided expert advice to other government entities involved with the events at Waco, and all such advice was in accordance with law. Government entities requested advice from members of the active duty military on four occasions. In December 1992 and January 1993, ATF sought and received advice from the Department of Defense liaison to ATF regarding what military support was available to assist ATF's operation. From February 3 to 27, 1993, ATF requested through Joint Task Force Six ("JTF-6") (a military organization responsible for coordinating counter-drug activity) that a detachment from the RSU provide advice concerning the planning and execution of the raid on the Davidian complex. From February 28 to March 1, the Governor of Texas requested and received advice from a general at Ft. Hood on what federal agencies to contact and how to respond to requests for Texas National Guard support. Finally, on April 13 and 14, the FBI and the Department of Justice requested and received advice from present and former members of the Army Special Forces on the effects of the tear gas that the FBI planned to insert into the complex.

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[40]Of the six detachments within the RSU, ODA 381 was specifically chosen to work with the ATF because none of its members were trained in close quarters battle.

The relevant statute[41] and Department of Defense directive provide that the active duty military may provide "expert" advice to law enforcement agencies, but the directive precludes "regular or direct involvement of military personnel in activities that are fundamentally civilian law enforcement operations."[42] The relevant active duty military authorities were well aware of this legal standard. With respect to ODA 381's involvement with ATF prior to February 28, the appropriate military authorities prohibited ODA 381 from providing some of the advice requested by ATF including evaluating ATF's plan of operations. The military legal authorities determined that critiquing ATF's operations plan could constitute direct participation in law enforcement activity. Specifically, the commander of JTF-6 ordered ODA 381 "not [to] become directly involved in BATF operational planning, nor assume responsibility for the BATF plan." The commander did authorize ODA 381 to assist ATF in setting up its practice area and critiquing the safety aspects of ATF's rehearsal. This activity was legal.

The advice given to the Governor of Texas on February 28, 1993, consisted of discussing ATF's request for the loan of Bradley vehicles and informing the Governor of the capabilities of the FBI's HRT. The general gave very limited advice in an area of his expertise, and this advice was, therefore, permissible under the law.

Finally, the present and former members of the Army Special Forces whom the FBI flew to Washington D.C. on April 14, 1993, to advise Attorney General Reno on the proposed tear gassing plan, explicitly told FBI and Department of Justice officials that they could not "grade your

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[41] 10 U.S.C. § 373 (2).

[42] See DoD Directive 5525.5, paragraph E4.1.5.

paper," meaning that they could not endorse or critique the gassing plan. Rather, they discussed the effects of CS gas on people, whether the delivery of tear gas could start a fire, whether the HRT personnel were fatigued or in need of retraining, and they described how the military would conduct the operation. They emphasized the differences between military and civilian law enforcement operations. This advice was within the areas of their expertise and did not constitute direct participation in law enforcement activity.

(e) National Guard Support. The National Guard, in its state status,[43] also provided extensive support to ATF and the FBI at Waco. Prior to the February 28 operation, the Texas National Guard flew five reconnaissance flights over the Davidian complex. In addition, the Alabama National Guard made one surveillance flight in support of the Texas National Guard's counter-drug program. ATF sought and received the support of three Texas National Guard helicopters, flown by Guard personnel, to act as a diversion during the February 28 operation. These helicopters were hit by Davidian gunfire early in the ATF operation. Throughout March and April, Texas National Guard personnel were present at Waco and served primarily in maintenance, liaison, and support positions. On April 19, members of the Texas National Guard were present at Waco in their capacity as maintenance and support technicians, but none became directly involved in the law enforcement operation. Finally, the Texas National Guard provided substantial military equipment to the FBI beginning on the evening of February 28. Specifically, the Guard provided, among other equipment, 10

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[43]The National Guard provided personnel support under the counter-drug provisions of 32 U.S.C. §112. Most of the equipment loaned by the Texas National Guard was loaned in accordance with the requirements of National Guard Regulation ("NGR") 500-1, Military Support to Civil Authorities.

Bradley vehicles, five Combat Engineering Vehicles ("CEV's"), one M88 tank retrieval vehicle, 12 M1009 wheeled vehicles, two heavy trucks, and various military supplies.

None of this support violated the *Posse Comitatus* Act because that Act does not apply to the National Guard in its state status. The Office of Special Counsel also considered, however, whether this support violated any other laws or the applicable National Guard regulations ("NGR's").[44] The Office of Special Counsel has concluded that the Texas National Guard's decision to accede to ATF's request by flying three National Guard helicopters near the complex on February 28, 1993, may have resulted in an inadvertent violation of guidance in NGR 500-2 which states that "pilots in command will not fly into or land in areas where the aircraft is likely to be fired upon"[45] and commanders "will also ensure that Guard members are not knowingly sent or directed to enter into a hostile environment where there is a probability of encountering small arms fire or life threatening situations."[46] Although the pilots indicated that they did not expect to be fired upon, the pilots knew that the Davidians were a dangerous group, and they did in fact take heavy fire from the Davidians during the ATF operations. Except for this possible inadvertent violation of guidance in NGR 500-2, the Office of Special Counsel has concluded the Guard's support was entirely in accordance with law and regulation.

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[44]The National Guard relied upon both NGR 500-1 and NGR 500-2, National Guard Counterdrug Support to Law Enforcement Agencies, Military Support to Civil Authorities to provide the support it did to the law enforcement agencies. Moreover, two versions of NGR 500-2 were used with the latter taking effect March 1, 1993.

[45]See NGR 500-2 dated October 1, 1992 at paragraph B-4 in Appendix B.

[46]See NGR 500-2 dated October 1, 1992 at paragraph B-5 in Appendix B.

The Office of Special Counsel has concluded that the allegation that National Guard helicopter crews fired at the Davidians on February 28 is without merit. Interviews with each of the crew members indicate that the Davidians fired at the helicopters but that the helicopter crews did not return fire. Instead, the crews immediately terminated the mission and landed their aircraft.

(f) Procedural and Administrative Issues. The Army conditions the loan of equipment on the execution of a loan agreement prior to delivery of the equipment. With respect to the equipment provided by the Army at Ft. Hood to the FBI after the February 28 ATF operation, the Army did not execute the lease agreement until June 30, 1993. The Office of Special Counsel considers this delay to be a procedural matter requiring no further action or investigation.

In addition, there has been extensive prior investigation into the issue of whether ATF fabricated information concerning drug use and production by the Davidians in order to obtain military support of the counter-drug resources of the active duty armed forces and the National Guard in preparation for the original raid on the complex, with sharply conflicting conclusions.[47] The issue is relevant to the charter of the Office of Special Counsel if the lack of a drug nexus would have precluded otherwise permissible activity of the armed forces of the United States.[48] It is important to

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[47]There is no legal standard for how strong the drug nexus needs to be in order to obtain military support. Clearly there was some investigation by ATF into possible drug activity at the complex, and ATF sought some assistance from the United States Drug Enforcement Administration ("DEA"). Moreover, there is no requirement that the military independently investigate the accuracy of the drug nexus alleged by a law enforcement agency soliciting military support.

[48]The issue of a drug nexus also goes to the question of whether the active duty military and National Guard had to be reimbursed for providing support to law enforcement agencies. If there is a drug nexus, then support provided by the armed forces premised on that drug nexus does not have to be reimbursed. See the National Defense Authorization Act of 1991, P.L. 101-510, div. A. Title 10 §

note that the vast majority of military support provided at Waco was not premised on any alleged drug nexus. Only the limited training provided to the ATF by ODA 381 before February 28 and some of the National Guard support were based on the drug allegations. None of the support provided by the active duty military to the FBI from February 28 through April 19, 1993 was in any way dependent on drug allegations. Thus, the drug nexus is a very minor issue with respect to this investigation.

Although the Office of Special Counsel did not extensively investigate the basis for ATF's assertion that there was a drug nexus, there is some evidence prior to February 28, 1993, connecting "drug activity" with the complex which could form the basis of a drug nexus (although ultimately federal agents found no evidence of illegal drugs at the complex).[49] Even if there had been no such nexus, the Office of Special Counsel has concluded that law enforcement agencies could have obtained the same level of support from the armed forces. While ATF would not have been permitted to make use of the counter-drug administrative resources of JTF-6 had there not been a drug nexus, the active duty military could have provided virtually the same support through other means even without a drug nexus. Similarly, the National Guard could have supported law enforcement in the manner it did

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1004, November 5, 1990, 104 Stat. 1485 and 32 U.S.C. §112. In the case of Waco, the vast majority of costs were reimbursed, and the issue of reimbursement was accurately addressed in the Report of the General Accounting Office of August 1999. Therefore, the Office of Special Counsel did not re-investigate this matter.

[49]The apparent drug nexus included four prior drug arrests and one drug conviction of Davidians, a "hot spot" detected in the complex during the Guard's surveillance flights which purportedly was an indicator of an active methamphetamine lab, and the alleged presence of a methamphetamine lab at the complex in the late 1980's. However, others have noted that there was no evidence of active use of drugs at the complex in 1993 and that Koresh had allegedly removed the methamphetamine lab when he took control of the Davidian group.

without a drug nexus, although obtaining such support may have been somewhat difficult under the relevant law and regulations.[50] Regardless of the level of drug nexus present, therefore, the Office of Special Counsel has concluded that the active duty military and National Guard lawfully provided their support.

In sum, the armed forces conducted themselves properly and commendably at Waco. The Office of Special Counsel will provide additional documentary and legal support for its analysis of the military issue in its Final Report.

5. Did any employee of the United States make or allow others to make false or misleading statements, or withhold evidence or information from any individual or entity entitled to receive it, or destroy, alter, or suppress evidence or information relative to the events occurring at the Branch Davidian complex on April 19, 1993?

Attorney General Reno gave the Special Counsel a broad mandate to investigate whether employees of the United States covered up material information concerning the government's actions at Waco on April 19, 1993. Public concerns about a potential coverup stemmed principally from several revelations in August and September of 1999: (1) that the FBI had fired pyrotechnic tear gas rounds on April 19, 1993, contrary to the repeated public denials of the FBI and Department of Justice for over six years; (2) that a previously undisclosed FLIR video recorded during the early

[50]If there were no drug nexus, all of the National Guard's support would have been provided under NGR 500-1. Obtaining the same support may have been difficult (but not illegal) because some of the support such as surveillance flights is not directly addressed in NGR 500-1, as it is in NGR 500-2.

morning of April 19, 1993, contained confirmation that the FBI fired such pyrotechnic tear gas rounds; and (3) that the 49th page of a key FBI lab report, which indicated that a shell from one of the pyrotechnic tear gas rounds was found near the Branch Davidian complex after April 19, 1993, was omitted from the document production made to Congress prior to the 1995 hearings.[51] The Office of Special Counsel, therefore, focused its coverup investigation on determining whether employees of the FBI or Department of Justice deliberately concealed the FBI's use of pyrotechnic tear gas rounds from Congress, the courts, counsel for the Davidians, and the American public. While the Special Counsel's investigation of this question is not yet complete, the Office has made substantial progress toward resolving this question. To the extent it is appropriate to reveal publicly, the status of the coverup investigation into the use of pyrotechnic tear gas rounds is discussed below.

Consistent with its mandate, the Office of Special Counsel also pursued numerous other coverup allegations and leads ranging from inconsistencies among witnesses' accounts, to claims of broad government-wide conspiracies to cover up activities that occurred at Waco other than the firing of the pyrotechnic tear gas rounds. None of these allegations resulted in any credible evidence of misconduct by any government employee. To the extent that any of these issues merit public discussion, they will be covered in the Special Counsel's Final Report. Three of these issues, however, have generated significant public concern, and the Special Counsel therefore feels it is appropriate to put these concerns to rest in this Interim Report. These issues are: (1) whether the FBI deceived

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[51]There was also substantial public concern over the revelation that military Special Forces personnel had been present at Waco and were alleged to have participated in the operation. The Office of Special Counsel has definitively laid to rest the allegations concerning the activities of the military Special Forces, as previously discussed in Section 4 above.

Attorney General Reno about the conditions in the complex and the status of negotiations prior to her approval of the tear gas plan; (2) whether any FBI employee intentionally removed audio from the FLIR tape recorded by the FBI Nightstalker aircraft from 10:42 a.m. until 12:26 p.m. on April 19; and (3) whether the FBI commanders at Waco lied to Congress in 1995 and to the Office of Special Counsel when they stated that they ordered a CEV to penetrate the complex on April 19 in order to create escape routes for the Davidians and deliver tear gas. As described below, the Special Counsel has concluded that: (1) the FBI did not deceive Attorney General Reno prior to her approval of the tear gas plan; (2) the FBI did not remove the sound or otherwise alter the FLIR tape covering the period 10:42 a.m. to 12:26 p.m.; and (3) the FBI commanders were truthful in their testimony about the purpose for breaching the complex.

(a) Did government officials intentionally conceal the FBI's use of pyrotechnic tear gas rounds from Congress, the courts, counsel for the Davidians, and others from April 1993 until August 1999? As detailed earlier, the FBI fired three pyrotechnic tear gas rounds at the concrete construction pit outside the main structure of the complex shortly after 8:00 a.m. on April 19, 1993. The firing of these rounds neither started nor contributed to the spread of the fire that consumed the complex four hours later. However, until August of 1999, FBI and Department of Justice officials repeatedly denied that the FBI had used *any* such device during the tear gassing operation. These statements were false, and the failure to acknowledge the use of pyrotechnic tear gas rounds for more than six years has greatly undermined public confidence in government.

The Special Counsel has investigated whether these false statements resulted from an intentional coverup, the negligent processing of evidence, or a series of unfortunate miscommunications and lack of communication among Department of Justice and FBI officials. While the Special Counsel has made substantial progress toward resolving this question, the investigation into this matter is ongoing.

However, the Special Counsel feels that it is appropriate at this time to (i) define the issue with specificity, (ii) note the misleading statements and missing evidence that are the subject of the investigation; and (iii) state the status of the "coverup" investigation.

(i) Terminology Issues. Whether or not there was a coverup is in many respects dependent upon nuances in terminology. The first issue relates to the difference between "pyrotechnic" and "non-pyrotechnic" tear gas rounds. In March and early April of 1993, as the FBI developed its tear gassing plan, several people– from the FBI, the Department of Justice, and the military– raised the concern that the gassing operation could cause a fire. Throughout consideration of the plan, the FBI gave its assurances to anyone who asked that the tear gas would be delivered through non-pyrotechnic means, meaning that the tear gas would not be spread with a charge that burns. However, the plan approved by Attorney General Reno did not use the words "pyrotechnic" or "non-pyrotechnic," stating only that the FBI was to deliver tear gas to the complex through booms on CEV's or, if the Davidians fired upon the FBI, through "ferret rounds" fired from M-79 grenade launchers. Canisters attached to booms spray CS without any sort of pyrotechnic charge to effectuate the delivery of the gas. A Ferret projectile, a plastic bulb with fins, breaks open on impact and disperses the CS in a liquid form without using a pyrotechnic charge. While the plan authorized the use of two forms of non-pyrotechnic gas, it

did not expressly preclude the use of pyrotechnic means of delivery. However, there is no dispute that Attorney General Reno expressly prohibited the use of pyrotechnics during her discussions of the plan with the FBI.

Further complicating the issue is that the word "pyrotechnic" is often, but mistakenly, used synonymously with the word "incendiary." The purpose of an incendiary device is to cause a fire. Technically, therefore, a pyrotechnic tear gas round is not "incendiary." Pyrotechnic tear gas rounds can cause a fire under certain circumstances, but they are not designed to do so and are, therefore, non-incendiary. Statements that the FBI did not fire "incendiary" devices at Waco on April 19 are, therefore, technically true, but could be misleading.

Further still, HRT commander Rogers, who authorized the use of the pyrotechnic rounds, asserted that the prohibition against pyrotechnics applied only to the introduction of gas at the living quarters of the Davidians, and did not apply to the concrete construction pit 75 feet from the living area of the complex. Attorney General Reno believes her exact words prohibited pyrotechnics "at the compound," which in her mind included the concrete construction pit. However, she has fully acknowledged that there was no discussion of what the "compound" was, and that others might not have understood the concrete construction pit to be part of the "compound." Attorney General Reno had the impression that the FBI would not use pyrotechnic devices during any phase of the operation, but Rogers did not share that belief, so there was no meeting of the minds.

This situation creates semantic difficulties in determining whether the FBI or Department of Justice covered up the FBI's use of pyrotechnic devices. Some of the statements that led the public to believe that the FBI had not used any pyrotechnic devices on April 19 suggest only that no

pyrotechnic devices were fired at the "compound" and arguably do not encompass the concrete construction pit. Another misleading statement, contained in a Department of Justice report on Waco, states that the FBI used only "non-incendiary" devices at Waco, which is, again, technically true because pyrotechnic tear gas rounds are not incendiary, although some government personnel used the terms "pyrotechnic" and "incendiary" interchangeably.

The issue is even further complicated by the various alternative names given to pyrotechnic tear gas rounds. In addition to the official designation of XM651E1 and abbreviated designation of M651, pyrotechnic tear gas rounds have been commonly referred to as "military rounds." At least one FBI agent allegedly referred to them as "cupcake rounds." Some government employees have used the term "bubblehead" during the past seven years to describe the appearance of pyrotechnic tear gas projectiles. Much of the documentary and testimonial evidence from 1993 and 1994 confirming that the FBI fired three pyrotechnic rounds at Waco on April 19 makes no mention of the word "pyrotechnic," but rather refers to M651 casings, military rounds, cupcake rounds, or bubbleheads. Some individuals with access to this information, who nonetheless failed to inform Congress, the public, or the courts that the FBI used the pyrotechnic gas rounds, have told the Office of Special Counsel that they did not understand that military tear gas rounds, bubbleheads, or cupcake rounds were pyrotechnic.

(ii) The Misleading Statements and Missing Evidence. The following trail of public statements led the American people to believe that the FBI had not used pyrotechnic tear gas rounds on April 19, 1993. Immediately following the fire, FBI Special Agent-in-Charge and spokesperson Robert Ricks stated at a press conference that the FBI had not used any pyrotechnic devices during the entire tear

gassing operation. In a prepared statement, Ricks stated, "the gas used was non-pyrotechnic; CS gas which does not cause a spark or flame. Also the delivery system utilized is non-pyrotechnic." In this same statement, Ricks later stated, "there was no gas being inserted into the building at the time of the fire. No pyrotechnics were used at any time." A few days later, Attorney General Reno told Congress that in discussions prior to her approval of the plan she "asked for and received assurances that the gas and its means of use were not pyrotechnic." Director Sessions told the same congressional committee that a critical factor in the FBI's choice of CS gas was that it "can be used without pyrotechnics." The "Report to the Deputy Attorney General on the Events at Waco, Texas February 28 to April 19, 1993" (the "Scruggs Report") issued by the Department of Justice on October 8, 1993, stated that "a nationally recognized team of arson experts has also concluded that … the gas delivery systems that the FBI used were completely nonincendiary."

During the preparation for the criminal prosecution of the Davidians in 1994, although HRT witnesses had told prosecutors that the FBI had fired "military rounds," "cupcake rounds" and "bubbleheads," (and the prosecutors' and paralegal's notes include the term "incendiary" to describe the rounds), prosecutors formally advised the defense counsel that there was "no evidence government agents fired gunshots on April 19, 1993 *other than ferret tear gas rounds*." (Emphasis supplied.) Under the case of *Brady v. Maryland*, prosecutors are required to provide the defense with exculpatory evidence, and, even though the question of who started the fire was an issue in the case, the prosecutors failed to disclose in their *Brady* submission to the defense the FBI's use of the pyrotechnic tear gas rounds.

During the joint hearings in 1995 by the House Committee on Government Reform and Oversight and the Committee on the Judiciary, the Committees issued a request for documents to the Department of Justice, specifically asking for "a listing of all pyrotechnic and incendiary devices" used at the Davidian complex. The Department of Justice provided no such list in its response to Congress. Rather, Department of Justice employee Richard Scruggs has acknowledged that during several informal briefings he told members of the Committees that the FBI used no pyrotechnic devices at Waco on April 19, 1993. Additionally, a member of the criminal trial prosecution team, Ray Jahn, submitted a written statement to the Committees stating that the FBI fired nothing on April 19 "other than the non-lethal ferret rounds which carried the CS gas." He has admitted that this statement is false but claims that he was merely "negligent" in not disclosing that rounds other than Ferret rounds had been used.

Several internal Department of Justice and FBI documents demonstrate how some of these incorrect statements to Congress originated. In preparation for its response to the congressional request for documents, Scruggs received a memo in June of 1995 from FBI headquarters staff specifically stating that "there were no incendiary or pyrotechnic devices used against the Branch Davidians on 4/19/93." The Department of Justice later assembled a briefing book for Attorney General Reno which included a section on the flammability of CS gas. It concluded "[p]yrotechnic rounds are not used by the FBI."

During the pre-trial phase of the civil lawsuit filed against the United States, counsel for the Davidians and their families filed the affidavit of an expert who received information from a Davidian attorney, Kirk Lyons, that a round referred to as a "bubblehead" was fired at the complex on April 19.

The expert noted that "military pyrotechnic munitions" may have been used by the FBI against the Davidians. Later, after more evidence of the use of such a round was advanced by the Davidians, the civil trial team filed a pleading incorrectly implying that the Davidians had fired a pyrotechnic round at the FBI.

Adding to the concerns raised by this series of misleading statements is that, to this day, no one can locate any of the three expended pyrotechnic tear gas projectiles, and no one has located two of the three shells. An FBI explosives expert has told the Office of Special Counsel that he saw two military tear gas projectiles on April 20, 1993, lying next to the concrete construction pit, and on April 30 a photographer photographed the third projectile which had been marked for evidence collection by a Texas Department of Public Safety highway patrolman. One of the Texas Rangers who was on the scene recalls collecting one expended shell, and discussing the shell with an FBI agent, who said he would have it examined, and later confirmed that it was a military tear gas shell. This shell casing is the only one in evidence. In addition, an FBI lab report detailing some of the evidence contains a reference only to this one M651 casing.

Equally disconcerting is the failure of the FBI to release, until September 1999, the early morning FLIR tape on which HRT commander Rogers is heard authorizing the firing of the military tear gas rounds. On the same tape, approximately 18 minutes later, the Charlie Team reports that the military rounds had bounced off the concrete construction pit. The FBI emphatically denied for years preceding its release that any such early morning FLIR tape existed, raising concerns that this FLIR tape remained undisclosed precisely because it contained independent confirmation that the FBI fired pyrotechnic tear gas rounds on April 19.

Finally, in September of 1999, the Department of Justice acknowledged that, in 1995, it produced to Congress an incomplete, 48-page version of the 49-page FBI evidentiary laboratory report. The missing 49th page of the report discloses that a 40 millimeter military tear gas shell was recovered at the Branch Davidian complex.

Considering the large number of misleading statements and omissions, as well as the missing physical evidence, it would appear that there was a coverup. However, there are countervailing considerations. First, all entities which received misleading information– Congress, the courts and counsel for the Davidians– concurrently received other information indicating that the FBI had in fact fired pyrotechnic rounds at Waco. For example, despite the misleading testimony cited above, Congress acknowledged that it received in 1995 several documents that referred to the use of "military rounds" by the FBI at Waco. Similarly, while the prosecutors did not make affirmative disclosure of the pyrotechnic rounds in their *Brady v. Maryland* submission to the Davidians, on December 15, 1993, counsel for the Davidians in the criminal trial received from Assistant United States Attorney LeRoy Jahn the FBI laboratory report that contains the reference to the military tear gas shell and the photograph of the projectile. Further still, some of the lawyers for the Davidians in the civil suit received the FBI lab report, the photograph, and notes from the preparation for the earlier criminal trial in which the Department of Justice trial team made reference to "military rounds" and "bubbleheads."

(iii) Status of the investigation into a possible coverup. The Office of Special Counsel has resolved several issues concerning its coverup investigation. With respect to other issues, the investigation is ongoing. Below is the status of each issue.

A. Statements of the Attorney General. The Office of Special Counsel has concluded that Attorney General Reno did not knowingly cover up the use of pyrotechnic tear gas rounds by the FBI. The evidence is overwhelming that, prior to the execution of the gassing plan, she sought and received assurances from the FBI that it would not use pyrotechnic tear gas rounds. The evidence is equally conclusive that the briefing materials and other information she received after the fact stated that the FBI had not used pyrotechnic tear gas rounds at Waco. Any misstatement that she made was inadvertent and occurred after diligent efforts on her part to learn the truth. The Office of Special Counsel has completed its investigation of Attorney General Reno, found her to be without direct fault for any false statements that she may have made, and will not pursue any action against her.

B. FBI Statements in 1993. The Office of Special Counsel has also concluded that FBI Director Sessions did not knowingly mislead Congress in 1993 regarding the FBI's use of pyrotechnics at Waco. Director Sessions' statement that CS gas was chosen because it could be used without pyrotechnics was true. He simply did not know that three pyrotechnic military tear gas rounds had also been used on the morning of April 19. Similarly, when Ricks gave his press briefing immediately after the fire, he did not know that any pyrotechnic tear gas rounds had been used. The FBI's plan clearly called only for the use of Ferret tear gas rounds which are non-pyrotechnic, and no one had told Ricks that the HRT had used pyrotechnic tear gas rounds that morning.

C. The Scruggs Report and Investigation. As stated earlier, in 1993, a team of Department of Justice lawyers and FBI investigators, led by Richard Scruggs, issued a report on the events at Waco. Although they did not investigate the issue of pyrotechnics, the Scruggs Report indicated that the tear gas used by the FBI at Waco was "non-incendiary." Members of the Scruggs

team went into the project with the assumption that the FBI had done nothing wrong. Former Deputy Attorney General Philip Heymann, who oversaw the entire project, agreed. Therefore, the Scruggs team did not even ask witnesses about the use of pyrotechnic rounds. During interviews of the HRT Charlie Team, the Scruggs investigators failed to ask about the different types of munitions fired on April 19. Even so, one witness told the investigators that he had heard radio transmissions about the use of a "military round" on April 19. The Scruggs team attributed no significance to this term, and did not pursue the matter. The Scruggs team was also aware of the video *Waco: The Big Lie*, produced by Linda Thompson, which contains news footage of "smoke" rising from the concrete construction pit. The film alleges that this "smoke" is evidence that the FBI started the fire. Even though the Scruggs Report discusses the cause of the fire, the Scruggs team never investigated the origin of this "smoke," which was actually tear gas emanating from a pyrotechnic military tear gas round. Lastly, Scruggs' FBI investigators had access to the FBI's photos, including the photo depicting a cloud of "smoke" rising from the area of the concrete construction pit and the photo of the military tear gas round in the field.

The failure of the Scruggs team to discover and report that the FBI used pyrotechnic tear gas rounds was the result of initiating the investigation with the assumption that the FBI had done nothing wrong, was inconsistent with the responsibility to conduct a thorough and complete investigation, and was clearly negligent.

D. The FBI Hostage Rescue Team. In November 1993, the criminal trial team prosecuting the Davidians interviewed members of the HRT at Quantico, Virginia. Those who knew of the use of the military tear gas rounds, including HRT commander Rogers, admitted openly to the criminal trial team that the FBI had fired the military tear gas rounds at the concrete construction pit on

April 19. In addition, HRT agent Robert Hickey acknowledged the use of the military tear gas rounds and their capacity to start a fire in a memorandum to an FBI lawyer in February 1996. HRT members candidly admitted to the Office of Special Counsel that they had used these rounds. There was clearly no attempt on their part to conceal the use of military tear gas rounds.

HRT commander Rogers did, however, sit silently behind Attorney General Reno when she testified to Congress in April 1993 that she had sought and received assurances that the gas and its means of delivery would be non-pyrotechnic. Rogers claims that he was not paying attention and did not even hear her when she made this statement, and Attorney General Reno notes that her statement was technically true because she sought and received the assurances *before* the operation. Similarly, Rogers attended the 1993 testimony of FBI Director Sessions, and did not correct misimpressions left by Sessions' statement that the FBI had chosen CS gas because it could be delivered without pyrotechnics. Rogers' failure to correct the misleading implications of the testimony of Attorney General Reno and Director Sessions was a significant omission that contributed to the public perception of a coverup and that permitted a false impression to persist for several years. Rogers attended the congressional hearings precisely to ensure that Congress was provided with accurate information. Instead, in the terms of the Attorney General's Order to the Special Counsel, Rogers "allow[ed] others

to make . . . misleading statements."[52] The Office of Special Counsel, however, will not pursue any further investigation of Rogers or any member of the HRT.

E. The 1995 Congressional Hearings. Attorneys from the Department of Justice who produced documents to the United States House of Representatives Committee on Government Reform and Oversight and the Committee on the Judiciary in advance of the 1995 hearings have come under public scrutiny for producing the FBI laboratory report containing the reference to the military tear gas round without the 49th page, which contains the relevant reference. In fact, however, while one copy of the report did not contain the 49th page, the Committees were provided with at least two copies of the lab report in 1995 which did contain the 49th page. The Office of Special Counsel easily located these complete copies of the lab report at the Committees' offices when it reviewed the Committees' copy of the 1995 Department of Justice document production. The Department of Justice document production to the Committees also included several other documents that referred to the use of the military tear gas rounds, including the criminal trial team's witness summary chart and interview notes. The Special Counsel has concluded that the missing page on one copy of the lab report provided to the Committees is attributable to an innocent photocopying error and the Office of Special Counsel will not pursue the matter further.

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[52]Nevertheless, the Office of Special Counsel has determined that Rogers' conduct did not constitute a prosecutable offense. The statements of Attorney General Reno and of Director Sessions were technically true, he did not have a *legal* obligation to ensure the accuracy of another person's testimony, and it is impossible to prove that Rogers actually heard and comprehended the Attorney General's or Director's statements. Even if there were sufficient proof to prosecute him, which clearly there is not, the statute of limitations expired in 1998.

The Office of Special Counsel has also investigated the origins of certain internal Department of Justice and FBI documents generated in connection with the 1995 hearings. As mentioned above, in preparation for those hearings, the Department of Justice prepared briefing materials on issues that the Department of Justice expected Congress to raise during the hearings, including the safety and flammability of the CS gas. Several of those documents incorrectly state that the means of delivery of the CS gas at Waco was not pyrotechnic. Also, in response to Congress' request for documents concerning pyrotechnic devices used on April 19, 1993, the FBI indicated to the Department of Justice that it used no such devices. The investigation of the Office of Special Counsel has focused on whether the misstatements in the documents were the product of any intentional wrongdoing. The Office of Special Counsel continues to investigate this matter and declines to comment further at this time.

F. Missing Physical Evidence. The Office of Special Counsel has investigated why the three military projectiles and two of the shells are not among the thousands of pounds of physical evidence stored at Waco. The Office of Special Counsel has developed information concerning this issue, but has not reached definitive conclusions and declines to comment further at this time, other than to state that the investigation continues.

G. Criminal Trial Team. There is no doubt that, in November 1993, FBI HRT members told several members of the criminal trial team that the HRT had fired military tear gas rounds at the concrete construction pit on April 19, 1993. Notes from the meetings and from trial preparation materials refer to "military rounds," a "bubblehead" and "cupcake rounds," and two separate sets of notes describe the rounds as "incendiary." The criminal trial team did not include information about the

pyrotechnic tear gas rounds in its *Brady* submission to the defendants, and instead told the defense lawyers the FBI only shot "nonlethal ferret rounds." This pleading was prepared by Assistant United States Attorney LeRoy Jahn and was signed by the leader of the trial team, Assistant United States Attorney Ray Jahn. Ray Jahn also submitted a written statement to Congress in 1995 where he again stated that the FBI had only fired "nonlethal ferret rounds." Ray Jahn admitted to the Office of Special Counsel that he had learned in November 1993 that a "penetrator round" had been fired at the concrete construction pit on April 19. He claims that he was only "negligent" in not disclosing this to the criminal defense attorneys and to Congress. The Office of Special Counsel is still investigating whether the criminal trial team intentionally concealed HRT's use of pyrotechnic tear gas rounds from counsel for the Davidians and from Congress.

H. Civil Trial Team. In February 1996, an HRT member told an FBI attorney, Jacqueline Brown, about the use of military rounds and their potential for causing fires. The Office of Special Counsel has devoted several months and considerable resources to determining why the responsible government officials did not disclose this information in the civil case or to the public until August of 1999. The short answer is the behavior of one FBI attorney.

In January 1996, Marie Hagen, the Department of Justice attorney responsible for the defense of the civil case, asked Jacqueline Brown, the FBI attorney assigned to the case, for help in responding to a declaration filed by an expert for the Branch Davidians and their families who alleged that the HRT had fired "at least one 'military round' in an effort to penetrate the construction pit." Brown faxed the declaration to the FBI chemical agent specialist. The declaration was also provided to HRT Special Agent Robert Hickey who discussed the particular areas of concern with Brown. On

February 15, 1996, Hickey drafted a memorandum to Brown which clearly stated that the HRT had fired two or three military tear gas rounds at the "underground shelter" early in the morning and explained that these rounds could not be used elsewhere in the complex "due to their potential for causing fire." Brown received a draft of the memorandum on February 16, discussed it with Hickey, and made notations regarding this key passage on her copy of the memorandum.

The Department of Justice did not specifically respond to the plaintiffs' expert's allegations regarding the military rounds in February 1996. In 1997, counsel for the Branch Davidians and their families filed a supplemental declaration by the same expert which reiterated the allegation that the government had fired pyrotechnic tear gas rounds on April 19, 1993. Again, the Department of Justice did not respond factually to the allegation. When the issue was again briefed in 1998, however, Hagen signed a pleading which stated in a footnote that:

> The degree to which plaintiff's expert testimony is based on speculation is demonstrated by Mr. Sherrow's conclusion that the 40 mm ordnance found within the compound "probably was fired by the U.S." because "it could be fired only from a military weapon and civilian possession of these weapons is severely restricted." This statement is extraordinary in that it ignores the virtual arsenal gathered by the Davidians, including two .50 caliber anti-tank guns.

While this footnote is not technically false, it is misleading in that it fails to acknowledge that the HRT did fire military tear gas rounds on April 19. Brown briefly reviewed this pleading before it was filed.

The key question is whether Brown told Hagen or anyone else about the information regarding military tear gas rounds contained in the Hickey memorandum. Although Brown insisted to the Office of Special Counsel that she gave the information regarding the use of military rounds to Hagen and to Brown's supervisor at the FBI, the evidence indicates that she did not.

First, the only evidence that Brown told Hagen about the Hickey memorandum is Brown's own statements. Brown's assertions are contradicted by the clear testimony of numerous witnesses and, more importantly, by her own later statements. The Office of Special Counsel interviewed Brown on four different occasions during which Brown gave several different accounts of her actions with respect to the Hickey memorandum. Even before the appointment of the Special Counsel, Brown asserted to several colleagues at the FBI that she was certain that she had faxed the Hickey memorandum to Hagen, an assertion that was belied by the absence of a fax cover sheet in her meticulously documented files. In a subsequent interview with the Office of Special Counsel, Brown denied having said that she remembered faxing the memo to Hagen. In another interview, Brown claimed that she had read the Hickey memorandum to Hagen word for word over the phone and that they had discussed the memorandum and the use of military tear gas rounds in detail again in 1997 after the Davidians filed the supplemental expert declaration. Hagen had no memory of any such conversations, and ultimately Brown, too, conceded that she had no specific memory of talking to Hagen about pyrotechnic military rounds before August 1999. Brown also claimed that she had discussed the Hickey memo with her immediate supervisor, Virginia Buckles. Buckles denied that Brown had told her about the Hickey memo, and, again, Brown ultimately told the Office of Special Counsel that she did not, in fact, recall speaking to Buckles about the Hickey memo or the FBI's use of military rounds. In short, Brown repeatedly made inconsistent, self-serving, misleading, and false statements to the Office of Special Counsel. Her assertion that she told Hagen or anyone else about the use of military tear gas rounds at Waco therefore lacks credibility.

Second, the documentary evidence also indicates that Brown did not give the information to Hagen. As stated above, neither Brown nor the Office of Special Counsel was able to locate a fax cover sheet indicating that she had faxed the Hickey memo to Hagen. Hagen's files contain no copy of the Hickey memo. In addition, Brown's "To Do" list in her calendar for February 19, 1996, contains the notation, "Sherrow Declaration Memo to M[arie] H[agen]." Unlike some diary entries, this "To Do" item is not checked off. Moreover, Brown placed a number on the Hickey memorandum which would result in its being placed in an FBI litigation file that would not be disclosed to the Department of Justice.

It is clear that Brown lied to the Office of Special Counsel during the course of this investigation. Her efforts to avoid blame in this matter have wrongly and unfairly cast suspicion on Hagen and on Brown's own superiors at the FBI. Her misleading statements have wasted countless hours and investigative resources. What the Office of Special Counsel has found is one FBI attorney's attempt to cover up her own misconduct. While this is reprehensible, it is not the principal focus of this investigation. Barring additional evidence, the Office of Special Counsel declines to pursue a criminal prosecution,[53] but will forward the matter to the appropriate State Bar Association and to the FBI Office of Professional Responsibility for appropriate action.

I. Undisclosed Morning FLIR. Until September 1999, the government repeatedly denied the existence of the early morning FLIR tape which contains the audio of HRT commander

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[53]As mitigating facts, the Office of Special Counsel notes that Brown did not destroy copies of the memorandum, and instead kept at least three copies in FBI files. Nor did she ask Hickey to change his statements about the use of military rounds. Indeed, Brown's diary entry could indicate that she did intend to give the information to Hagen, but simply failed to do so.

Rogers authorizing the firing of the military tear gas rounds and the Charlie Team reporting that the military tear gas rounds bounced off the concrete construction pit. In responding to numerous Freedom of Information Act requests after 1993, the government denied that any FLIR tapes existed from April 19, 1993, prior to 10:42 a.m. However, in early September 1999, after the press ran stories about the use of the pyrotechnic tear gas rounds, government officials located early morning FLIR tapes among materials in the custody of the HRT and the FBI's Aviation and Special Operations Unit. The Office of Special Counsel continues to investigate the issue of the early morning FLIR tapes and declines to comment further at this time.

(b) The FBI did not mislead Attorney General Reno in order to persuade her to approve the tear gas plan. The Office of Special Counsel investigated allegations that the FBI misled Attorney General Reno about the conditions in the complex and the status of negotiations in order to convince her to approve the tear gas plan. These allegations are entirely baseless. The Office of Special Counsel has interviewed all of the witnesses who attended meetings with Attorney General Reno during the days prior to her approval of the plan and has reviewed the documents that were provided to her and her staff. The FBI briefed Attorney General Reno fully and fairly on the conditions at Waco. The FBI provided her all of the information that she requested, and the FBI diligently followed up on the questions that she raised. Indeed, Attorney General Reno maintained during her interview with the Special Counsel that she was apprised of all material facts, and the evidence confirms that she was.

(c) The FBI did not alter the FLIR video. The FLIR tape recorded by the FBI Nightstalker aircraft from 10:42 a.m. to 12:16 p.m. on April 19, 1993, does not contain audio. Attorneys for the Branch Davidians and their families claimed that the FBI removed the audio in the weeks following the fire in order to hide radio communications among the FBI commanders. This allegation took on greater credibility with the discovery of undated handwritten notes that the Office of Special Counsel removed from the office of an FBI attorney. The notes read in part: "the originals had audio on them but when copies were made by FBI HQ, the audio portion was removed."

To investigate this allegation, the Office of Special Counsel had an accomplished audio and video alteration expert conduct a detailed examination of the original FLIR tape. The expert determined that the FLIR tape was recorded in a depth modulated form, meaning that the audio and video signals were intermixed during recording. In this mode of recording, it is not possible to delete the audio from the video tape without also deleting the original video. The expert concluded that, although the entire FLIR tape for the period 10:42 a.m. to 12:16 p.m. contains no audio (and video is off for five minutes and 41 seconds of the tape), no one altered the FLIR tape. Instead, the expert believes it is probable that the crew of the Nightstalker simply failed to activate the audio. This conclusion is buttressed by an audio transmission from the preceding flight of the Nightstalker which indicates that the operator turned off the audio recorder at the conclusion of that flight.

The Office of Special Counsel believes this expert analysis completely resolves the issue and concludes there was no alteration of the late morning FLIR. The Office of Special Counsel will provide an expert report of this issue in its Final Report.

(d) The FBI commanders did not mislead Congress about their reasons for ordering the CEV to breach the gymnasium area of the complex in order to facilitate the introduction of tear gas. The Office of Special Counsel investigated whether the FBI on-scene commander Jamar and HRT commander Rogers were truthful when they testified before Congress that they ordered CEV-3 to breach the gymnasium to clear a path to the base of the tower of the complex for tear gas insertion. Jamar also testified that he wanted to create escape routes for the Davidians. Members of Congress and others have charged that the destruction of the gymnasium was an effort to harm the Davidians or to dismantle the building prematurely.

Rogers and Jamar provided the Office of Special Counsel the same explanation they had provided to Congress. Their statements were fully supported by all of the other agents involved in this aspect of the April 19 operation. These agents confirmed that: (1) earlier in the day, Rogers and Jamar had expressed a desire to create escape routes for the Davidians; (2) Rogers instructed CEV-3 to breach the gymnasium in order to get close enough to the tower to permit the insertion of tear gas; and (3) Jamar and Rogers never indicated an intent to dismantle the complex or to harm the Davidians. Further support for the credibility of the agents' statements is that one of the two HRT agents in CEV-3 had told FBI investigators about Rogers' instructions to make a path to the base of the tower only 24 hours after the fire at Waco– long before the propriety of their activities at the gymnasium came into question.

In addition to the statements of the agents, one of the logs kept on April 19 has a specific entry at 10:57 a.m. which fully supports the statements that CEV-3 was attempting to create a path to the base of the tower for tear gas insertion. It states:

HRT–1 directs delivery to base of the tower– Black.

"HRT-1 " refers to HRT commander Rogers. "Black" refers to the back side of the complex, where the gymnasium was located.

The FLIR video which recorded almost the entire activity of CEV-3 at the gymnasium also provides very significant evidence. While the video clearly shows the collapse of the gymnasium, it also supports the agents' statements that they were attempting to create a path to the tower. CEV-3 made its first penetration of the gymnasium at 11:18 a.m. Between 11:18 a.m. and 11:27 a.m., CEV-3 made nine successive penetrations into the gymnasium. Each penetration was into the same opening and towards the tower. After the ninth penetration, when the gymnasium roof began to collapse, the driver of CEV-3 continued to attempt to penetrate the gymnasium, still aimed toward the tower.[54] If the intent had been to dismantle the gymnasium, there were both safer and quicker means to accomplish that result. In fact, HRT had a CEV with a blade specifically equipped to dismantle the structure if the HRT so desired.

The Office of Special Counsel is also aware of a document dated June 24, 1993, entitled "Recommendation for the Shield of Bravery for the Hostage Rescue Team," which states:

> At mid-morning, [the agents in CEV-3] were given the mission of slowly and methodically beginning the dismantling of the large facility to the rear of the compound commonly called the "gymnasium." Utilizing their CEV in a very deliberate and surgical manner, they began dismantling the gymnasium.

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[54]Eventually, CEV-3 did begin to penetrate the gymnasium in a direction not aimed at the tower. However, the evidence indicates this was done because of concern of a possible threat of a Davidian reported to be in the upper floor of the gymnasium.

The Recommendation was submitted by Jamar and Rogers, although the investigation has not yet determined whether either of them or someone else prepared the document. While the document contradicts the testimony of Jamar and Rogers that the penetration of the gymnasium was for the insertion of tear gas and the creation of escape routes, on March 3, 1994, Jamar resubmitted a revised Recommendation in which the above-quoted language was deleted.

The Office of Special Counsel is continuing to investigate who authored the June 24, 1993 version, but the Office is confident the quoted language is simply incorrect. The FLIR video does not show a "deliberate and surgical . . . dismantling of the gymnasium," and the agents in CEV-3 were fully credible in stating that they were not given the mission to dismantle the gymnasium.

Rather, the evidence to date indicates Jamar and Rogers wanted the Davidians to exit the complex peacefully and they testified truthfully as to their intent in ordering CEV-3 to breach the gymnasium.

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After interviewing 849 witnesses, reviewing two million pages of documents, examining thousands of pounds of physical evidence, studying thousands of photographs, listening to hundreds of hours of audiotapes, viewing hundreds of hours of videotapes, and conducting numerous expert analyses and tests, the Office of Special Counsel concludes with certainty that the government did not start the fire on April 19, that the government did not fire gunshots on April 19, and that the government did not misuse its armed forces during the Waco incident. Rather, the Davidians caused the tragic loss

of life on April 19. The Office of Special Counsel has further concluded that the government did use three pyrotechnic tear gas rounds on April 19. The use of these rounds did not start the fire, nor did it otherwise cause harm to the Davidians.

With respect to the government's handling of inquiries and litigation that followed April 19, 1993, the Office of Special Counsel has concluded that certain employees of the government concealed the FBI's use of pyrotechnic tear gas rounds at the concrete construction pit on April 19 from Congress, the courts, and the public. The Special Counsel continues to investigate whether such concealment was intentional and criminally actionable.

III. Investigative Methods

This Section of the Report describes the investigative methods employed by the Office of Special Counsel to ensure the reliability of the conclusions discussed above.

Prior to the appointment of the Special Counsel, the executive, legislative, and judicial branches of government had already conducted factual inquiries concerning the events at Waco. The Office of Special Counsel studied the 1993 "Report to the Deputy Attorney General on the Events at Waco, Texas February 28 to April 19, 1993" (the "Scruggs Report"); the 1993 "Fire Investigation Report;" the 1993 "Lessons of Waco: Proposed Changes in Law Enforcement" (the "Heymann Report"); the 1993 "Evaluation of the Handling of the Branch Davidian Stand-Off in Waco, Texas by the United States Department of Justice and the Federal Bureau of Investigation" (the "Dennis Report"); the 1993 "Report of the Department of the Treasury on the Bureau of Alcohol, Tobacco and Firearms Investigation of Vernon Howell also known as David Koresh" (the "Treasury Report"); the 1999 Report by the General Accounting Office to the Secretary of Defense, Attorney General and Secretary of the Treasury entitled "Military Assistance Provided at Branch Davidian Incident" (the "GAO Report"); transcripts of the congressional hearings of 1993 and 1995; the 1996 Report on the "Investigation into the Activities of Federal Law Enforcement Agencies Toward the Branch Davidians" issued by the United States House of Representatives, Committee on Government Reform and Oversight and Committee on the Judiciary (the "House Report"); transcripts of the criminal trial of the Davidians in 1994; and filings and testimony in the civil suit brought by the Davidians and their families against the United States. While the Office of Special Counsel did not rely upon the findings of these inquiries, it adopted a methodology that thoroughly tested the relevant conclusions that they reached.

(1) Staffing. The Office of Special Counsel has employed 74 people, including 16 attorneys, 38 investigators, and 21 support personnel. In hiring attorneys, the Special Counsel sought a balance of experience: prosecutorial, criminal defense, large case management, and writing experience. The supervisory attorneys included Deputy Special Counsel, Edward L. Dowd, Jr.[55] who resigned as the United States Attorney for the Eastern District of Missouri to serve as Senator Danforth's deputy.[56] The remaining attorneys included one criminal defense lawyer, three present and one former Assistant United States Attorneys, two former judge advocates of the United States Air Force, two civil attorneys and one former Department of Justice trial attorney.

The United States Postal Inspection Service ("USPIS") provided most of the investigators. The Office of Special Counsel did not hire agents from the FBI, ATF or any other agency implicated in the investigation. A core of 15 USPIS inspectors assisted in all aspects of investigative operations, and 20 inspectors performed document and evidence review and coding. The USPIS provided its inspectors without seeking reimbursement from the Department of Justice for their

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[55]Other supervisory attorneys included Chief of Staff Thomas A. Schweich, a civil litigator at Bryan Cave LLP and writer with experience in large case management; Director of Investigative Operations, James G. Martin, an Assistant United States Attorney specializing in public corruption cases; and Stuart A. Levey, chief of the Washington Office, who came from the criminal defense firm Miller, Cassidy, Larroca & Lewin LLP. Thomas E. Wack, a civil litigator at Bryan Cave LLP and member of the American College of Trial Lawyers, served as General Counsel. The Office also retained legal scholar Geoffrey Hazard as an ethics consultant.

[56]Concurrently, Mr. Dowd became a partner at the St. Louis office of the law firm Bryan Cave LLP.

salaries.[57] Most inspectors had at least 10 years of investigative experience, many at a supervisory level. The Office of Special Counsel also hired one retired USPIS Deputy Chief Inspector, a retired special agent of the Internal Revenue Service and the resident agent in charge of the U. S. Drug Enforcement Administration office in St. Louis.

Support personnel included secretaries, legal assistants, a receptionist, two administrative officers and three interns. The Office of Special Counsel also hired contractors to assist in matters relating to information technology.

Each employee who did not have an active government security clearance went through a background check conducted by the Office of Federal Investigations,[58] and certain employees designated by the Office of Special Counsel obtained security clearances at the top secret level and special Department of Defense briefings for access to secured, compartmentalized national defense information. Senator Danforth required each employee and expert to sign a statement in which the employee or expert promised complete impartiality and agreed not to communicate publicly on issues concerning the investigation.

(2) Offices. At the outset of the investigation, Senator Danforth determined that he would headquarter the investigation in St. Louis, Missouri, since the witnesses were dispersed across the country. Senator Danforth also believed that he could better conduct an impartial, unimpeded

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[57]The agents were under the supervision of the Director of Investigative Operations, and Assistant Inspector In Charge Robert Stewart and Inspector In Charge Rick Bowdren.

[58]Because the FBI was a subject of the investigation of the Office of Special Counsel, the Office did not permit the FBI to conduct the background checks.

investigation if it were headquartered outside of Washington. However, in the interests of economy and efficiency, Senator Danforth opened a smaller Washington office that interfaces directly with the various federal agencies involved in the investigation and handles matters concerning many witnesses who live in the Washington, D.C. area.

The Office of Special Counsel has also staffed a small office in Waco, Texas, so that investigators have more direct access to the voluminous evidence stored at or near the courthouse. The Waco office generally houses two or three investigators who focus on reviewing the physical evidence and obtaining information from the Texas Rangers.

(3) Document Acquisition and Control. In order to organize the large volume of documentary evidence, the Office of Special Counsel assigned one lawyer, 20 agents, and a paralegal to work on document acquisition, control, and review.

(i) *ACQUISITION*. The Office of Special Counsel established a highly structured system for the acquisition of documentary evidence. The Office has obtained over two million pages of documents, 27,400 photographs, 440 video tapes, 1900 audio tapes, 250 computer diskettes, and 13 computer hard drives. The Office requested documents from the Department of Justice, the FBI, the Central Intelligence Agency ("CIA"), the United States Attorney's Office for the Western District of Texas, ATF, the Department of Defense (including several thousands of pages of classified materials), the Smithsonian Institution, the White House, counsel representing the Davidians and their families in the civil litigation, and several additional sources.

The Office of Special Counsel asked the government entities to produce all documents and other materials related in any way to the Waco matter. The Office of Special Counsel also

reviewed the records compiled by the Texas Rangers, which the Rangers had delivered to the custody of the United States District Court for the Western District of Texas, Waco Division.[59] Initially, the federal agencies provided the Office of Special Counsel with the same documents that the agencies had provided to the Court in the civil litigation, but this production lacked some relevant documents, including privileged, law enforcement sensitive, post-September 1999, and computer-stored documents, among others. The Office of Special Counsel encountered substantial resistance from some federal agencies to the production of some of these records.

The Department of Justice, for example, resisted the production of notes and records of its attorneys that post-dated the appointment of Senator Danforth, even though it acknowledged that it had no right to withhold privileged communications from the Office of Special Counsel (because the Office is technically part of the Department of Justice). Furthermore, the Office of Special Counsel and Department of Justice had numerous disagreements over the production of computer files, hard drives, and e-mail. In addition, the Office of Special Counsel repeatedly received assurances from the Department of Justice that the Department of Justice had produced all hard copy documents, yet witnesses told the Office that certain categories of documents had not been turned over to the Office. Similarly, individual witnesses arrived at interviews with notes, videos and diaries that the Department of Justice had never asked them to provide to the Office of Special Counsel.

Ultimately the parties resolved evidence production issues to the satisfaction of the Office of Special Counsel. However, the Office expended an unnecessarily large amount of time and

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[59]On August 9, 1999, Judge Smith ordered that all federal agencies and the Texas Rangers deliver their Waco-related documents and evidence to the federal courthouse at Waco.

resources negotiating these issues in light of the Attorney General's initial offer of total openness and independence for Senator Danforth.[60] On several occasions, Deputy Attorney General Eric Holder had to intervene to secure the cooperation of certain Department of Justice officials.

Having received information that led the Office to believe that there may have been similar omissions in the FBI's production of documents, the Office of Special Counsel (with the consent and approval of FBI Director Louis Freeh) took the unprecedented step of sending eleven agents and three attorneys to search files within the FBI's Office of General Counsel, and obtained important records in the process.

Similarly, ATF initially resisted the production of records that ATF had promised its agents would be kept confidential. The parties agreed that the Office of Special Counsel would review those documents at ATF and copy only those relevant to the investigation. Ultimately the cooperation of ATF was commendable.

The Office of Special Counsel also obtained commendable cooperation in obtaining documents from the United States Attorney for the Eastern District of Texas, the Department of Defense, and the counsel for the Davidians and their families. As of the date of this report, the Office is satisfied that it has received all documents of relevance except for certain Department of Justice e-mails. The Department of Justice has indicated its intent to produce these e-mails promptly.[61]

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[60]Because she is a material witness, the Attorney General recused herself from interface with the Office of Special Counsel, so she bears no personal responsibility for the difficulty in obtaining records.

[61]Some individuals and agencies raised the issue of whether the Privacy Act would prohibit the public disclosure of the evidence obtained by the Office of Special Counsel. The Office of Special

(ii) *DOCUMENT CONTROL*. Investigators for the Office of Special Counsel put documents obtained from any source, except for classified Department of Defense documents[62] and some documents from the FBI Office of General Counsel, into a computerized database system established and run by Washington, D.C. based Litigation Systems Inc. ("LSI"). LSI, which has developed and utilized digital litigation support technology since 1984, had previously worked on numerous complex civil cases as well as several federal projects, including a major case for the Antitrust Division of the Department of Justice. Ultimately, LSI assisted the Office of Special Counsel in converting over two million pages of documents into an easily accessible electronic form. Cleared LSI personnel performed the initial document coding, entering such fields as author and date. The Office of Special Counsel utilized 20 experienced postal inspectors to review and comment upon each document received.[63] Each lawyer and investigator received mandatory training on how to search for documents, by using specific text, words, and fields within documents. This activity proved valuable in locating a significant number of key documents that previous investigators and parties had not uncovered and that would probably not have come to light were it not for the efforts of the United

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Counsel and the Department of Justice agreed that Department of Justice Privacy Act experts would determine how to comply with the Privacy Act. They determined that the public release of this Interim Report would not violate the Act.

[62]The Office of Special Counsel handled classified Department of Defense information in accordance with Department of Defense security and storage requirements. The findings of this report are in no way limited by the inability of the Office of Special Counsel to disclose certain classified aspects of the Department of Defense's activity at Waco. All such information is immaterial to the questions contained in the Attorney General's Order.

[63]This effort was led by Assistant Special Counsel John J. Sardar and Postal Inspector Frank L. Graham.

States Postal Inspection Service document review team and the sophisticated technology provided by LSI.

(4) Physical Evidence Review. The Office of Special Counsel conducted an exhaustive review of the physical evidence that the Texas Rangers gathered from the complex after the fire. The evidence is located in two places. First, the physical evidence that the Rangers believed might be used in legal proceedings is currently in 214 numbered boxes in the basement of the federal building in Waco. Investigators from the Office of Special Counsel examined and photographed all of this evidence. They then provided a log of the evidence to each Office of Special Counsel attorney and investigator for review.

Second, several thousand pounds of shell casings, fire debris, concrete, etc., which the Department of Justice criminal trial team did not believe would be used in legal proceedings, are in 12 large Conex containers stored two miles from the courthouse at Waco. Several investigators with the Office of Special Counsel, working with the Rangers, went through these containers and found additional physical evidence relevant to the investigation.

(5) Witness Interviews and Reports. As of July 17, 2000, the Office of Special Counsel had interviewed 849 witnesses, including present and former employees of the Department of Justice, the FBI, the Department of Defense, ATF, the CIA, the Texas Rangers, the Texas Department of Public Safety, the Alabama and Texas National Guards, the Smithsonian Institution, the Tarrant County Medical Examiners Office, Davidians, fire and FLIR experts, pathologists, experts on the religious practices and beliefs of the Davidians, and interested third parties. The Office conducted

follow-up interviews of 46 witnesses. In addition, the Office of Special Counsel reviewed statements made by these witnesses in interviews, depositions, testimony, and Congressional hearings.

During the first two weeks of the investigation, the Office of Special Counsel secured agreements with the Department of Justice, the Court, the congressional committees investigating the Waco matter, and counsel for the Davidians that any party interviewing any witness would afford the Office of Special Counsel 10 days prior notice so that the Office could interview the witness first.[64] The Office wanted to interview witnesses before they were prepared for testimony before Congress or in the civil litigation discovery process.

The Office of Special Counsel's Director of Investigative Operations then determined the order of the interviews. When an interview was scheduled, the responsible attorney or agent posted information about the interview on a central board at the office, so that the entire team could provide information to the interviewers that would assist in the interview process. Upon completion of the interview, the agent or lawyer assigned to each interview prepared a detailed memorandum of interview. The interviewers gave brief reports of interviews at staff meetings and distributed the memoranda of interviews to attorneys and agents. The document team then placed the completed memoranda of interviews on a searchable database.

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[64]Senator Arlen Specter, heading a subcommittee of the United States Senate Committee on the Judiciary, agreed in a letter only to hold off on interviews for thirty days after the beginning of the investigation, but in practice generally provided advance notice of any interview that his staff intended to conduct. The parties to the civil litigation did not actually execute a stipulation requiring 10 days notice until March 2000, but agreed to this process from the outset and adhered to it prior to the execution of the stipulation.

The Office of Special Counsel reviewed with several witnesses who requested them copies of their memoranda of interview, and allowed the witnesses to make suggestions or corrections. The Office of Special Counsel permitted other witnesses to go over the notes of the interview with the agent at the end of the interview to ensure that the notes accurately recounted the witness statements. None of the witnesses made any material changes to the notes or memoranda reviewed by them.

(6) Expert Analysis, Field Tests, and Reports. The Office of Special Counsel retained experts in the fields of arson, fire spread analysis, toxicology, chemical engineering, atmospheric gas dispersion, explosives, ballistics, tool mark examination, audio and video enhancement and authentication, forensic phonetics, forensic pathology, air traffic operations, FLIR systems, and FLIR imagery interpretation.[65] The Office of Special Counsel experts reviewed the prior work of other experts and performed independent analyses of physical, audio, video and photographic evidence. The work and findings of these independent experts have been critical to the Office of Special Counsel's investigation. The USPIS administered the retention and payment of experts to prevent the Department of Justice from obtaining insight into the activities of the experts. The USPIS also provided polygraph and forensic document examination (which included both handwriting and indented writing analysis) expertise, forensic photography, computer forensic assistance and video reformatting and reproduction assistance. The Final Report of the Special Counsel will contain the qualifications and detailed findings of the experts.

Experts provided opinions on the following issues:

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[65]These experts worked under the direct supervision of Bradley J. Swenson, Assistant Special Counsel–Experts and Consultants.

(i) *FIRE*. The Office of Special Counsel instructed its fire experts to determine: (A) whether CS or methylene chloride gas caused or contributed to the spread of the fire; (B) the effect of ventilation on the tear gas concentration levels inside the complex; (C) the points of origin and cause of the fire; (D) how fast and in what manner the fire spread; (E) whether having firefighting equipment on the scene would have saved additional lives; and (F) the cause of the explosion observed at 12:26 p.m. on April 19.

(ii) *TOXICOLOGY*. The Office of Special Counsel tasked its two toxicological experts to determine whether CS or methylene chloride gas killed, incapacitated or disoriented any Davidians to the point that they were unable to exit the complex.

(iii) *WEAPONS/BOMB*. The Office of Special Counsel ballistics and tool mark experts determined: (A) whether shell casings collected from FBI sniper positions indicated that the FBI fired shots on April 19, and (B) whether fuel cans collected from the debris contained manmade tool strike holes. Explosives experts from Northern Ireland and the United States also analyzed debris and other evidence to respond to allegations that a shaped charge exploded at the complex on April 19.

(iv) *PATHOLOGY*. A forensic pathologist with special expertise in sudden death due to gunshots, explosion, and fire reviewed the original autopsy files and independently determined the cause of death for each Davidian who died on April 19. For each Davidian who died of a gunshot wound, the pathologist determined the likely type of ammunition used (high versus low velocity) and, if possible, the distance from which the weapon was discharged.

(v) *FLIR*. As stated earlier, the Office of Special Counsel retained two organizations with FLIR expertise to analyze the 1993 FLIR data. Vector Data Systems (U.K.), Ltd. performed an

analysis of the 1993 "flashes" on the FLIR tape and worked jointly with the Office of Special Counsel and the United States District Court for the Western District of Texas to develop the protocol for and to execute the FLIR test at Ft. Hood.[66] The second expert utilized advanced enhancement techniques and computer algorithms and analysis to determine whether the flashes on the 1993 FLIR tape were associated with any human movement or government gunfire. In connection with the execution of the FLIR test, the Office of Special Counsel also retained an air operations expert who controlled the activity of the helicopter and fixed-wing aircraft during the test at Ft. Hood.

(vi) *AUDIO/VIDEO*. The Office of Special Counsel retained three experts to analyze audio and video tapes including the Title III tapes from April 16 to 19, 1993, and the FLIR tapes from April 19, 1993. These experts reviewed the relevant tapes for alteration, erasure, and authenticity. They also transcribed audio tapes.

(7) Civil Proceedings. At the time that Attorney General Reno appointed Senator Danforth and several times thereafter, senior representatives of Department of Justice recommended that the Office of Special Counsel seek a stay of the civil proceedings brought by the Davidians and their families against the government pending the outcome of the Office of Special Counsel investigation. The Office of Special Counsel rejected this recommendation because: (1) Senator Danforth did not want to delay or deprive the Davidians of their day in court; and (2) the legal precedent for such a stay was weak since the investigation was not initially criminal in nature. The Office of Special Counsel developed

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[66]The FLIR test would not have been possible without the direct assistance of Secretary of Defense William S. Cohen and his staff, and the assistance of the Right Honorable Geoffrey Hoon MP, Secretary of State for Defence of the United Kingdom.

early a constructive relationship with the Court that ultimately allowed for such activities as the court-supervised FLIR test and an effective system for the production, maintenance, and storage of evidence. The parties to the civil litigation agreed that the Office of Special Counsel could have *ex parte* communications with the Court.[67] Cooperation between the Court and the Office of Special Counsel has proven beneficial to the truth-seeking process.

(8) Interaction with Congress. The Office of Special Counsel has maintained communications with representatives of both the majority and the minority members of the congressional committees that have been conducting investigations of the Waco incident concurrently with the investigation by the Office of Special Counsel.[68] The Office of Special Counsel did not disclose specific investigative facts to the congressional committees, but it did coordinate the interviews of certain witnesses with the congressional committees. At the request of the Department of Defense, the Office of Special Counsel also allowed the disclosure to Congress of the results of the polygraph test of a former U. S. Army Special Forces soldier who was acting as an observer at Waco on April 19, 1993. In addition, the Office of Special Counsel permitted several congressional staff members to observe both

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[67]After the Office of Special Counsel proposed the joint FLIR test with the Court against the wishes of the Department of Justice, some Department of Justice officials made efforts to have the Department of Justice order the Office of Special Counsel to cease communicating with the Court. The Office of Special Counsel made it clear to the Department of Justice that it would not cease such communications. The Deputy Attorney General agreed with the Office of Special Counsel that the office could continue *ex parte* communications with the Court.

[68]These committees were the United States Senate Committee on the Judiciary chaired by Senator Orrin Hatch, Senator Patrick Leahy, Ranking Minority Member and its special subcommittee headed by Senator Arlen Specter; and the Committee on Government Oversight and Reform of the House of Representatives of the United States chaired by Representative Dan Burton, Representative Henry Waxman, Ranking Minority Member.

the FLIR test at Ft. Hood on March 19, 2000, and the review of evidence in the Conex containers at Waco in November of 1999. The Office of Special Counsel cooperated fully with an audit of its financial controls by the General Accounting Office, the auditing arm of Congress, in April 2000.

(9) Interaction with the Department of Justice and FBI. As Senator Danforth was the first person appointed under the new Department of Justice Special Counsel Regulations, 28 CFR § 600 *et seq.*, the Office of Special Counsel interacted frequently with the Department of Justice to resolve issues concerning the division of administrative responsibility between the Office of Special Counsel and the Department of Justice. The Office of Special Counsel and the Department of Justice also had frequent contact concerning the Department of Justice's compliance with investigative requests made by the Office of Special Counsel during the course of the investigation.

These discussions were often contentious. Employees of the Department of Justice took the position that the Department of Justice could maintain a certain degree of control over the conduct of the investigation, which the Office of Special Counsel considered improper since the Department of Justice was a subject of the investigation. For example, the Department of Justice: (1) attempted to deny the Office of Special Counsel access to internal documents postdating the appointment of Senator Danforth and resisted the production of important e-mail as being too burdensome; (2) claimed to control the power to waive the Department of Justice's attorney-client privilege; and (3) demanded that the Department of Justice be consulted before the Office of Special Counsel took any actions (such as proposing the FLIR test) that might affect the results of the civil litigation. The Office of Special Counsel did not allow these problems to affect the integrity of its investigation, and ultimately obtained all the information that it requested. However, the Office of Special Counsel strongly recommends that the

Department of Justice draft more specific guidelines outlining the relationship between a Special Counsel and the Department of Justice in situations where the Department of Justice is the subject of the investigation, and that the Department of Justice recognize the need for the investigative independence of the Office of Special Counsel in such situations.[69]

IV. Statement of Facts

The following Statement of Facts contains the essential background information needed to understand the conclusions of the Special Counsel's Interim Report on the five issues contained in Order 2256-99 of the Attorney General. It does not attempt to chronicle fully the Waco incident.

A. ATF Commences its Investigation of the Branch Davidians.

1. In May 1992, the McLennan County Texas Sheriff's Department provided information to the Bureau of Alcohol, Tobacco and Firearms ("ATF") that Vernon Howell, also known as David Koresh ("Koresh"), leader of the Branch Davidians religious group at Mt. Carmel (the "Davidians"), had received large shipments of firearms, inert grenades, and black powder at a small structure known as the Mag Bag, located approximately six miles from the main Davidian living quarters outside of Waco, Texas. Investigation by ATF revealed deliveries by United Parcel Service ("UPS") of suspicious firearms components and possible explosive precursor materials. Further investigation revealed that

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[69]The need for more specific guidelines is underscored by the fact that the Office of Special Counsel had numerous problems with the Department of Justice which often required the personal intervention of the Deputy Attorney General and the Director of the FBI to resolve.

upon arrival at the Mag Bag, the UPS driver would be met by a Davidian and escorted to the Mt. Carmel complex. At the complex, the Davidian would make payment, often in cash.

2. Working in consultation with the United States Attorney's Office for the Western District of Texas, Waco Division, ATF began a federal investigation of the Davidians. Over the next several months, ATF agents developed additional information which corroborated their suspicion that the Davidians had produced, and continued to manufacture, illegal weapons and explosives. ATF derived this information from interviews with former Davidians, discussions with a confidential informant, records of UPS shipments to the complex, and reports of experts who had studied the contents of shipments of explosive materials received by the Davidians.

3. In addition to the specific evidence of illegal gun manufacturing, ATF learned that Koresh and his followers harbored strong anti-government views, that he expected confrontation with the federal government, and that he and his followers viewed such confrontation as a means to religious salvation. More detailed information on these beliefs will be included in an Appendix to the Final Report. This information heightened ATF concerns that Koresh had violent intentions that posed a danger to the public.

4. Following a series of internal ATF meetings in December 1992, ATF began an undercover operation intended to develop additional evidence that the Davidians had violated federal firearms laws. ATF rented a house approximately 325 yards from the Davidian complex and, on January 11, 1993,

began surveillance operations. In addition, ATF agents posed as students and made contact with Davidians who worked in and around Waco. In particular, ATF undercover Special Agent Robert Rodriguez made direct contact with Koresh in late January 1993 and continued to visit the complex up to and including February 28, 1993. Koresh conveyed to Agent Rodriguez his disdain for federal gun control laws and ATF in particular. As a result of the information developed during the course of the investigation, ATF concluded that there existed probable cause to believe that the Davidians had violated and continued to violate federal firearms laws. At that point, ATF began preparations for a search of the complex and the arrest of Koresh.

B. ATF Seeks the Support of the Armed Forces of the United States and Claims a Drug Nexus to Its Investigation.

5. In late November or early December 1992, ATF determined that it might be able to supplement its understanding of the Davidian complex by conducting aerial reconnaissance. On December 4, 1992, a representative from the Department of Defense told ATF that it could obtain aerial reconnaissance from the armed forces, but that ATF would have to reimburse the armed forces for the costs of the support that the armed forces provided unless the investigation had a "drug nexus." At that time, ATF informed the Department of Defense representative that there was no drug connection with its investigation.

6. On December 11, 1992, a representative of ATF visited the office of the Texas National Guard counter-drug support program to solicit National Guard support. A National Guard

representative also told ATF that the counter-drug support program would only support ATF if ATF established a drug nexus to its investigation. Nevertheless, on December 14, 1992, ATF wrote a letter to the Texas National Guard counter-drug support program requesting "the use of aerial reconnaissance of the target site in the form of aerial photography," but did not mention the existence of a drug nexus.

7. In mid-December 1992, Special Agent David Aguilera, the ATF case agent for the investigation of the Davidians, began to solicit information from his sources about the possible use of illegal drugs at the complex. A former Davidian reported to ATF that there had been an illegal methamphetamine lab at the Davidian complex when Koresh took over the complex in 1988. ATF learned that some Davidians had histories of drug use, trafficking, and arrests, and that the Davidians had received shipments of chemicals that they could possibly use to manufacture methamphetamine. An ATF agent later reported that Koresh had stated that the complex would be a good site for a methamphetamine lab.

8. Believing that it had developed an adequate "drug nexus" to avail itself of the National Guard's counter-drug program, ATF sent a second request for support to the Texas National Guard dated December 18, 1992. This letter explicitly referenced possible narcotics at the complex. From this point forward, all ATF requests for assistance to the National Guard and the active duty military of the United States in connection with the initial investigation of the Davidians made some reference to the possible use or manufacture of illegal drugs at the complex.

9. The Texas National Guard agreed to support the investigation. On January 6, 1993, it flew an aerial surveillance mission over the Davidian complex using a UC-26 fixed wing aircraft equipped with a thermal imaging system. An informal analysis of the thermal imaging data done by a Guard airman who was not a qualified infrared image interpreter revealed a "hot spot" which he thought to be consistent with the existence of a methamphetamine laboratory at the complex. The Alabama National Guard, working at the request of the Texas National Guard, flew a follow- up mission over the complex on January 14. The Texas National Guard then resumed its surveillance flights, flying missions over the complex on February 3, 6, 18 and 25. The Guard aircraft provided video and photographic reconnaissance to ATF which assisted ATF in planning future operations.

10. As the National Guard provided its surveillance support, ATF stepped up its efforts to obtain support from the active duty armed forces of the United States for a planned search of the complex and arrest of Koresh. On January 22, Department of Defense's liaison to ATF drafted a letter for the signature of ATF's Chief of Special Operations to the Army Regional Logistics Support Office ("RLSO") in El Paso, Texas. The letter requested (a) the use of the Military Operations in Urban Terrain ("MOUT") facility at Ft. Hood, (b) the loan of seven Bradley Fighting Vehicles ("Bradleys") to ATF, and (c) driver training and on-call maintenance support for the Bradleys. The letter referred explicitly to the "continuation of the firearms and drug case" and contained an attachment listing an extensive amount of equipment that it wanted on an on-call basis. The Army RLSO orally informed ATF that it could not meet a request of such magnitude.

11. Despite the initial rejection of its request, ATF continued to solicit military support. On February 2, ATF briefed representatives of Operation Alliance, the Joint Task Force Six ("JTF-6"), and the commander of the Rapid Support Unit ("RSU") on the status of the investigation. Operation Alliance is a coalition of law enforcement and military organizations which coordinates counter-drug support in the Southwest Border Region, including the State of Texas. JTF-6 serves primarily as a "clearing house," linking law enforcement agencies with military units for counter-drug missions. In early 1993, the RSU was comprised of a Special Forces company of Third Special Forces Group from Ft. Bragg, North Carolina, and its function was to carry out the counter-drug missions delegated by JTF-6.

12. On February 2, after the briefing, an ATF coordinator at Operation Alliance prepared requests for military support of the planned operation which were sent to JTF-6 and the Texas National Guard. These letters were signed by a border patrol agent who served as the Operation Alliance Director of Resource Management, and sought assistance in "planning, training, equipping and command and control in serving a federal search warrant . . . to a dangerous extremist organization believed to be producing methamphetamine." These letters also stated "special assistance is needed in medical evacuation contingency planning and on site trauma medical support." ATF dropped its earlier request for the Bradleys.

13. On or about February 3, the commander of the RSU, Major Mark Petree, began to question the propriety of fulfilling ATF's request for military support. Specifically, he expressed concerns about ATF's request for training which included assistance in planning ATF's service of a

federal search warrant and providing RSU medics on site during the execution of the warrants. He relayed his concerns to a Special Forces civilian employee who in turn contacted Major Philip Lindley, a military lawyer for the U.S. Army Special Forces Command at Ft. Bragg, North Carolina. Maj. Lindley concurred with Maj. Petree, believing that ATF's request for assistance exceeded the level of active duty military participation in civilian law enforcement activities permitted by applicable federal statutes, case law, military regulations and policy. Maj. Lindley believed that the requested assistance as proposed "crossed the line" and exposed the active duty military members of the RSU carrying out this request to both civil and criminal penalties.

14. Maj. Lindley drafted a memorandum on February 3, 1993, which reflected his thought processes as events unfolded. In that memorandum, he stated his position on the ATF request as follows: "at the point where the RSU assisted in the actual planning and rehearsal of the take down, participation in the arrest was 'active'." Therefore, it was not permissible. Maj. Lindley also expressed his concerns about the on-scene medical support requested by ATF. He believed that by treating injured Davidians, Special Forces medics would be in danger of "direct participation in the search and arrest of the civilians." Finally, Maj. Lindley also discussed in his memorandum the training capabilities of the RSU, stating that providing close quarters battle training was beyond the expertise of the unit. Based on these facts, Maj. Lindley concluded that ATF's request "appeared to go beyond DoD guidance for these missions," and he "advised against the operation" as initially planned.

15. Later on February 3, following discussions with Maj. Petree, Maj. Lindley received a call from Lt. Col. Ross Rayburn, legal advisor to JTF-6, who vigorously disputed Maj. Lindley's assessment that the proposed RSU mission was improper, and accused Maj. Lindley of trying to "undercut" the counter-drug mission of JTF-6. Lt. Col. Rayburn also issued a legal opinion that ATF's requested assistance was legal, in part because ATF had not requested RSU to accompany ATF to the complex to effectuate the search. Lt. Col. Rayburn wrote "[t]here is no legal objection to providing ATF with instruction and training during the rehearsal phase of the operation." Furthermore, Lt. Col. Rayburn stated "there is no legal prohibition" on providing medical care support. After further discussions with counsel at the Army Special Operations Command and the United States Special Operations Command, Lt. Col. Rayburn yielded and the military components involved reached a consensus that the RSU would not provide the assistance as initially requested.

16. During the following weeks, relevant military authorities worked on an "execution order" detailing the support that the RSU would provide, and they had the order reviewed by a military lawyer for possible violations of the law, including the *Posse Comitatus* Act. The execution order dated February 17, 1993, directed that the "RSU will not provide mission specific advice . . . RSU teams will not accompany BATF teams on either the operation nor [sic] any site visit within the area of operation," and "RSU personnel will not become involved in search, seizure, arrest or similar law enforcement related activities." Subsequently, the commander of JTF-6, Brig. Gen. John Pickler, issued the order to the RSU, and members from one of the RSU's six detachments, ODA381, arrived at Ft. Hood on February 22 prepared to provide ATF the support authorized in the order. Over the next few days,

members of ODA381 and ATF officials met to identify the necessities for the ATF's training and rehearsals.

17. Between February 24 and 26, ODA381 constructed a portable door entry and re-useable window on a practice facility, helped ATF tape off an area that represented the Davidian complex, provided medical evacuation and radio communications training, and coordinated the use of the ranges at Ft. Hood. On February 26 and 27, ATF conducted rehearsals at Ft. Hood. ODA381 provided safety advice and acted as human "silhouettes" during ATF's room clearing exercises. As ordered, the ODA381 let ATF define the parameters of its operation. Most of ODA381's members left Ft. Hood on the evening of February 27. Four ODA381 members remained at Ft. Hood until February 28 to assist in cleaning up the training site. Due to a flat tire and a severe thunderstorm, these four ODA381 members were delayed in their return and arrived back at McGregor Range, New Mexico, on March 1. No ODA381 members accompanied ATF to the Davidian complex on February 28.

18. Also in February 1993, ATF obtained permission from the Texas National Guard to utilize Guard helicopters and crews in connection with the planned search and arrest at the Davidian complex. In the last week of February, three members of the Texas National Guard, the commander of the Austin Army Aviation Facility, the State Aviation Officer, and one of the pilots who flew the mission on February 28, learned that ATF planned to use the Guard's helicopters as a diversion for ATF's raid. One person, the commander of the Austin Army Aviation Facility, expressed safety concerns to the State Aviation Officer about the plan. Nonetheless, the plan to use the Guard helicopters as a diversion

did not change. On February 27, the Guard helicopters participated in ATF's rehearsals, and the remaining pilots and crew of the Guard helicopters learned for the first time that they would act as a diversion during the ATF raid the next day.

C. ATF Attempts to Execute Search and Arrest Warrants.

19. On February 25, ATF Agent Aguilera presented to a federal magistrate an affidavit in support of an application for warrants to arrest Koresh and to search the Davidian complex and the surrounding 77 acres. The affidavit had been reviewed by Assistant United States Attorney William Johnston. The affidavit alleged violations of 26 U.S.C. § 5845(f)– unlawful possession of a destructive device. The affidavit also contained a discussion of alleged child abuse. There was no mention of alleged drug activity at the complex. The federal magistrate issued the warrants that same day.

20. According to ATF, on February 28, while ATF prepared for the dynamic entry into the complex, Agent Rodriguez entered the complex and spoke to Koresh. While there, he learned that Koresh had heard about the planned execution of a warrant and that the operation had been compromised. Indeed, local media had also learned of the planned search and arrest and had preceded ATF to the complex to cover the entry. Rodriguez reported to his supervisors that Koresh knew about ATF's operation. ATF supervisors nonetheless decided to execute the warrant on February 28.

21. Members of ATF's warrant execution team departed a preset staging area at 9:30 a.m. on February 28 in cattle trailers. They arrived at the complex, entered the driveway, exited their vehicles,

and approached the complex. According to Davidians Kathryn Schroeder, Victorine Hollingsworth and Marjorie Thomas, several Davidian males, including Koresh, were armed and prepared to fire on ATF agents. While there is some dispute as to who shot first– a matter outside the scope of the Attorney General's Order to the Special Counsel– there is no dispute that the Davidians were prepared for a gun battle and had ATF significantly outgunned.

22. A fierce and tragic gun battle ensued. Before a cease-fire could be arranged, the Davidians killed four and wounded twenty ATF agents. Additionally, ATF killed two and wounded five Davidians. At some point during or after the gun battle, the Davidians intentionally shot and killed three of their own at close range: Peter Hipsman (an apparent mercy killing), Perry Jones and Winston Blake. All three Texas National Guard helicopters took fire and were forced to land, but personnel on board suffered no injuries. Witness interviews indicate that the Guard helicopters did not return fire.

23. At 9:48 a.m., Davidian Wayne Martin telephoned the Waco 911 emergency services and was put in contact with a deputy sheriff. Martin indicated that ATF agents were firing into the complex, but Martin soon hung up the phone. After Martin hung up, the deputy called the complex and yelled over an answering machine for someone to pick up the phone. The deputy eventually spoke to Martin but could not effectuate a cease-fire. At 10:35 a.m., undercover ATF agents provided the ATF Assistant Special Agent in Charge with the Davidians' phone number and, after an hour of negotiations with Koresh's second in command, Steven Schneider, the parties agreed upon a cease-fire.

24. Later that day, Davidian Michael Dean Schroeder attempted to enter the complex. When ATF agents encountered Schroeder at the outer perimeter of the complex, he fired 18 shots at the agents. They returned fire and killed him. The death of Schroeder brought the total number of Davidians killed on February 28, 1993, to six.

D. ATF Transfers Control of the Standoff to the Department of Justice.

25. On March 1, after a series of meetings and teleconferences between senior officials of the Department of the Treasury (of which ATF is a component) and the Department of Justice (of which the FBI is a component), ATF turned control of the situation at the complex over to the Department of Justice, and, more particularly, to the FBI. FBI Director Sessions then briefed President Clinton on the status of the standoff at Waco.

26. As of February 28, President Clinton had not formally appointed a new Attorney General. Stuart Gerson, a Bush Administration holdover, remained Acting Attorney General until Janet Reno was sworn in on March 12. Attorney General Reno had many people reporting to her on Waco-related matters. These included Associate Attorney General Webster Hubbell. Other reporting relationships were as follows. The Criminal Division at the Department of Justice normally reported to the Deputy Attorney General, but since there was no Deputy Attorney General in place during the entire Waco standoff, the Division reported directly to the Attorney General. John C. "Jack" Keeney was the Acting Assistant Attorney General who headed the Criminal Division. Under the Assistant Attorney General were several Deputy Assistant Attorneys General, including Mark Richard who supervised the activities

of the Terrorism and Violent Crimes Section of the Criminal Division ("TVCS"). Section Chief James Reynolds and Deputy Chief Mary Incontro headed the TVCS. John Lancaster was a trial attorney in TVCS who later worked on the team that prosecuted some of the Davidians in 1994. The United States Attorney's Office for the Western District of Texas had primary responsibility for prosecuting federal crimes at Waco, including the shooting of the ATF agents. Ronald F. Ederer was the United States Attorney for the Western District of Texas, headquartered in San Antonio, Texas. Several Assistant United States Attorneys including First Assistant James DeAtley, William "Ray" Jahn, LeRoy Jahn, John Phinizy, and William "Bill" Johnston reported to Ederer. Johnston and Phinizy worked out of the Waco office.

27. Day-to-day law enforcement activity during the 51-day standoff was under the direct control of the FBI. FBI Director William Sessions reported to the Attorney General. Deputy Director Floyd Clarke and Associate Deputy Director W. Douglas Gow reported to Director Sessions. Assistant Director Larry Potts headed the FBI's Criminal Investigative Division, which reported to Clarke. Reporting to Potts was Deputy Assistant Director Danny Coulson, and Michael Kahoe, the Section Chief for the Violent Crimes and Major Offenders Section of the Criminal Investigative Division.

28. The FBI assigned the Special Agent in Charge of the FBI's San Antonio office, Jeff Jamar, as the on-scene commander at Waco and assigned numerous agents and FBI Special Weapons and Tactics ("SWAT") teams to work under his command. The FBI also assigned Special Agent in Charge Robert Ricks and Special Agent in Charge Richard Swenson to assist Jamar in supervising his team of

agents. On February 28, 1993, Jamar dispatched Supervisory Special Agent Byron Sage, a trained negotiator, to Waco. The FBI later assigned Special Agent Gary Noesner to lead the negotiation team. Several weeks later, Special Agent Clifford Van Zandt replaced Noesner as head of the negotiation team. The FBI also later assigned a fourth Special Agent in Charge, Richard Schwein, to its Waco team.

29. In parallel with the establishment of the negotiation team, the FBI deployed its tactical team. On February 28, senior FBI officials notified Richard Rogers, commander of the FBI Hostage Rescue Team ("HRT") that he should deploy to Waco. Among the HRT members who reported to Rogers (and whose activities proved relevant to the charter of the Office of Special Counsel) were Supervisory Special Agent Steve McGavin and Special Agent David Corderman. The HRT also had sniper teams on site, one of which was led by Special Agent Lon Horiuchi.

30. The FBI personnel located themselves in three operations centers. In Washington, FBI leadership activated the Strategic Information Operations Center ("SIOC") where the FBI had its command and control resources. At Waco, the FBI on-scene commanders established the rear Tactical Operations Center ("TOC") located in a hangar at a former Air Force base on the campus of Texas State Technical Institute approximately five miles from the Davidian complex. The FBI on-scene leadership, negotiators, behavioral scientists, investigators, and agents monitoring the listening devices secretly inserted into the complex operated from the rear TOC. The FBI also established a forward TOC near the "Y" intersection, consisting of three mobile homes about 1000 yards from the front of the

complex. This forward TOC served as the tactical operations center for the HRT and contained a communications center for equipment set up by the HRT, some with the assistance of the Army Special Forces.

31. The FBI designated areas of the complex by number and letter. It designated the front or south side of the complex as the white side, the back or north side of the complex as the black side, the right or east side of the complex as the red side, and the left or west side as the green side.[70] The FBI referred to the first floor as "Alpha," the second was "Bravo," the third was "Charlie," and the fourth was "Delta." Window and door designations were identified by counting from left to right.

32. The FBI HRT established sniper positions around the complex. The HRT Blue Sniper Team occupied Sierra-1 in the former ATF undercover house facing the white side of the complex. Upon their arrival at the Sierra-1 sniper position, members of the Blue Sniper Team observed spent shell casings in the undercover house. Sierra-1 Alpha was located in a house next door to Sierra-1 and housed assault team members and technical equipment. The HRT Gold Sniper Team occupied Sierra-2 in a structure on the green/black side of the complex. HRT also created Sierra-3, a sandbagged position on the red

[70]The complex did not line up precisely on an east-west axis, but the Special Counsel uses these directional approximations for ease of reference.

side which HRT snipers occupied on an as-needed basis.[71] Prior to April 19, HRT assaulters also operated the Bradleys obtained from the National Guard from the sniper positions.

E. The FBI Obtains Additional Military Support.

33. Within hours after the gun battle between ATF and the Davidians on February 28, ATF and FBI made requests for extensive military support. Texas Governor Ann Richards saw the gun battle on television and immediately called the Commanding General of the United States Army's III Corps at Ft. Hood to ask if he knew anything about the operation. The general informed the Governor that III Corps had no assets at Waco and did not know any details of the operation, but he dispatched Brigadier General Peter J. Schoomaker, from the First Cavalry Division at Ft. Hood, to Austin, Texas, to advise the Governor and the Adjutant General concerning the requests for military support that they had received from ATF and the FBI. After meeting with Governor Richards, Gen. Schoomaker drove to Waco, arriving early on March 1. He met briefly with HRT commander Rogers, discussed the situation in general terms, and then returned to Ft. Hood. He did not provide any advice to the FBI at that time.

34. The Texas National Guard immediately dispatched 10 Bradleys to the scene with their crews and trained HRT members in their use. The National Guard later provided five CEV's, a tank retriever, as well as trucks, jeeps and supplies. All of this equipment was operated by the law

[71] Sierra-4 was a campsite on the green side occupied by SWAT teams. It was located along the fence line beyond the inner perimeter of the complex.

enforcement personnel, not by National Guard personnel. The National Guard also provided maintenance support personnel and liaison personnel to handle any further equipment requests.

35. The FBI also made several requests for the loan of equipment and related training from the active duty military. Members of the active duty military trained HRT members in the operation of the equipment and provided maintenance support, but they did not operate the equipment. During the standoff, the U.S. Army provided two Abrams tanks (after disabling their offensive capability), three UH-1 helicopters, unmanned ground surveillance vehicles, trucks, communications equipment, ammunition, and various military supplies. Furthermore, the U.S. Army provided crews for vehicle and helicopter maintenance, medical staff, and liaison officers to handle additional equipment requests. The Army at III Corps obtained a legal opinion from an Army lawyer that providing military equipment to law enforcement agencies was permissible, but the Army deviated from standard procedures by failing to execute a lease agreement with the FBI for the equipment until after the standoff.

36. The U.S. Army Special Forces also supported the FBI. Its members provided surveillance equipment in the form of remote observation cameras which transmitted television images from locations around the complex to the FBI forward TOC and a thermal imager located on a water tower several hundred yards from the red side of the complex. The Special Forces also provided ground sensing equipment to assist with the security of the perimeter of the complex. In order to train the FBI on the use of the equipment, observe its use, and maintain it, the Special Forces provided a total of 10 personnel during the entire standoff, although usually only three or four were present at any given time.

On two occasions prior to April 19, Special Forces personnel went to forward positions (still hundreds of yards away from the complex) to repair or install the equipment. The Special Forces observers gathered information about the performance of the FBI and the performance of the Special Forces equipment. The Air Force provided television jamming equipment that government contractors operated briefly during the standoff. A member of the British Special Air Service ("SAS") was also present as an observer early in the standoff but had no active role in the FBI operation.

F. The FBI Attempts to Negotiate a Peaceful Resolution of the Standoff.

37. As the reports of other Waco investigations have set forth in detail, the FBI negotiation teams and the tactical teams ran different and sometimes conflicting operations. Most of this information is irrelevant to the charter of the Office of Special Counsel, but the following narrative provides some context relevant to the Special Counsel's conclusions. The negotiators centered their activities in a Negotiations Operations Center at the rear TOC. The FBI negotiators worked with negotiators from ATF, the Texas Department of Public Safety, the Austin Police Department, and the McLennan County Sheriff's Department. Their principal objective was to secure the release of the children in the complex and eventually effectuate the peaceful arrest and departure of the adults. They worked in 12-hour shifts. Each shift utilized a primary negotiator and a secondary "coach" who maintained notes of the negotiations and provided prompts to assist the primary negotiator. FBI personnel recorded and, if possible, transcribed the contents of negotiation sessions. Each shift kept a negotiations log and handwritten chronology. The negotiators regularly prepared "situation reports" summarizing the status of

negotiations. The negotiators also relied upon behavioral psychologists and religious experts for advice concerning the likely reaction of the Davidians to their negotiation strategy.

38. Over the 51 days, more than 40 law enforcement officers participated in negotiations, the objective of which was to get the Davidians to leave the complex peacefully. In order to effectuate a peaceful resolution to the standoff, Jamar made numerous concessions to Koresh based upon the recommendations of the negotiators. On March 1, the negotiators arranged the radio broadcast of a scripture message recorded by Koresh. Two days later, based on Koresh's promise to come out, they arranged for a one-hour message from Koresh to be aired nationally on television and radio. The negotiators also allowed Davidians to exit the complex for such matters as the burial of Davidian Peter Gent, to dispose of their dead dogs, and to retrieve Bible study materials from one of their cars. The negotiators sent in medical supplies for the wounded, made multiple deliveries of milk and food for the children, and provided the Davidians communications from family members outside the complex, as well as legal documents that Davidians had requested. Moreover, the negotiators took the unprecedented step of permitting criminal defense lawyers to enter the complex on several occasions to meet with Koresh and Schneider, even though the crime scene was unsecured.

39. The negotiators had some early success. Between February 28 and March 23, Koresh allowed 35 people to exit the complex. But Koresh also made repeated, well-chronicled and unfulfilled promises to exit the complex with the remaining Davidians, allowing only two people to exit after March 23. As early as March 3, a key behavioral psychologist, Dr. Park Dietz, advised the negotiators that

Koresh would not leave the complex and would not allow anyone about whom he truly cared to leave, including his numerous biological children. FBI negotiators also obtained conflicting opinions on the likelihood of a mass suicide by the Davidians. The negotiators considered the possibility of a mass suicide either within the complex or as part of an assault against the FBI by exiting Davidians. On March 27, Schneider told negotiators that the FBI should set the building on fire. Eventually, after meetings with his attorney, Koresh promised that he would exit the complex after he had written an interpretation of the Seven Seals referenced in the Book of Revelation. The negotiators concluded that this was another empty promise because Koresh failed to turn over an interpretation of any of the Seven Seals.

40. The tactical group, led by the HRT, ensured the security of the perimeter of the complex and executed tactics designed to force the Davidians out of the complex. As the standoff wore on, tactical actions– in which some negotiators concurred but others clearly did not– included cutting off the electricity, the unpredictable movement of vehicles, the use of flashbangs (loud, bright but non-lethal diversionary devices) to force Davidians venturing outside the complex without the intent to surrender to go back inside, and the use of disturbing sounds around the complex. The FBI logs and interviews indicate that the FBI utilized as few as seven and as many as 10 flashbangs near the complex during the standoff. Some negotiators believed that the activities of the tactical operators interfered with their efforts to get the Davidians to surrender peacefully. All tactical decisions were, however, approved by Special Agents in Charge, who received input from both the tactical group and the negotiators.

G. The FBI Develops a Tactical Solution to the Standoff.

41. As the release of Davidians slowed, and the prospects for the peaceful exit of the Davidians dimmed, the FBI stepped up efforts to develop a tactical resolution to the standoff. The FBI had developed the initial template for a tactical resolution during March, at a time when the prospect for the voluntary surrender of Koresh was still high. The development of such plans during hostage situations was standard operating procedure for the FBI, and did not indicate an intent by the FBI to engage in a tactical resolution in the early stages of the standoff. The FBI would normally effectuate such a plan only in emergency situations such as suicide or murder within the complex.

42. In early March, HRT began the development of a tear gas insertion plan that the FBI could use to resolve the standoff even in a non-emergency situation. The "Proposed Operations Plan" dated March 10, 1993, provided that (a) CEV's would clear all obstacles from the white and red sides, (b) CEV's would approach the front of the complex, (c) the FBI would demand the surrender of the Davidians, and (d) if necessary, personnel inside the Bradleys would shoot projectible flashbangs wherever needed and deliver CS gas into the complex. CEV's would create escape routes by punching holes into the building structure. In contrast to the final plan, which required the gradual insertion of tear gas, this plan called for the FBI to insert as much tear gas as necessary to secure the exit of the Davidians.

43. On March 14, after discussions within the FBI on the contents of the March 10 draft plan, the HRT issued a "Proposed Operations Plan - Revision #2." The plan provided that CEV's would

insert tear gas through canisters on booms on the vehicles, and made the first mention of the possible use of "ferret rounds"– non-pyrotechnic tear gas rounds fired from M-79 grenade launchers. Neither this revised plan nor the preceding one made any reference to the use of military or pyrotechnic tear gas rounds.

44. On March 16, at FBI headquarters in Washington, D.C., FBI Deputy Assistant Director Coulson sent an e-mail message to FBI Acting Deputy Director Larry Potts addressing the tear gas insertion plan that the FBI leadership at Waco had developed and refined in the preceding days. The message discussed the possibility that the Davidians could engage in mass suicide or start a fire deliberately or by accident, but it concluded that personnel safety, among other factors precluded a firefighting response. The memorandum stated that the CEV's would make escape openings for the Davidians and then insert tear gas.

45. Despite concerns for the safety of firefighters, both Jamar and Sage contacted the Waco Fire Department, among others, to determine what fire response was possible. Waco Fire Chief Robert Mercer and Bellmead Fire Chief James Karl met with FBI agents several weeks prior to April 19 and were asked to prepare a plan to assist the FBI if needed. During this meeting, the Chiefs used aerial maps to target water resources. Based on information provided by the departments, the FBI prepared a firefighting plan.

46. While the FBI negotiators tried to bring about a peaceful resolution to the standoff by providing telephonic suggestions to Koresh on how the Davidians could exit the complex and how the FBI would treat them thereafter, the negotiators began to lose hope that Koresh would ever leave voluntarily. An FBI memorandum dated March 22 prepared by the negotiation team indicated that the negotiators were willing to consider the tactical use of tear gas to end the standoff.

47. On March 23, following a request by HRT commander Rogers to implement the tear gas plan, Coulson wrote a memo critical of Rogers' request. He stated his opinion that HRT members at Waco were fatigued, noted the mistakes of the Ruby Ridge incident in which Rogers played a role, and advised Potts that both Potts and Kahoe should go to Waco to assess the situation for themselves.

48. On March 27, Jamar initialed "Proposed Operations Plan– Revision 3." This revised plan called for the removal of all obstacles, such as fences and vehicles, from the white side of the complex the day before the tear gas insertion. The following day, the FBI would commence an all out insertion of tear gas into the complex. Two CEV's and four Bradleys would deliver tear gas into the complex without warning. The booms on the CEV's would penetrate the complex to deliver the tear gas and would also create exits for the Davidians. Attached to the plan were medical assignments and communications information, and involved the use of military personnel within the medical staging facility. The plan contained no reference to the use of flashbangs or pyrotechnic tear gas rounds.

49. Over the next several days, Coulson, Jamar and other FBI personnel debated the advisability of the tear gas insertion plan. Discussion centered around the concern that the Davidians might shoot at FBI agents immediately upon commencement of the operation. In Washington, D.C., Coulson expressed concern that the risk of Davidian gunfire was so high that the FBI should not implement the plan. At Waco, however, Jamar and others continued to advocate an all-out tear gas assault which differed substantially from the gradual insertion plan advocated by those in Washington.

50. On April 7-8, Clarke and Potts traveled to Waco in an effort to develop a consensus as to whether to recommend a tactical resolution to the standoff and, if so, what solution to recommend. After a series of meetings with Jamar, Rogers and others, they decided that a tactical resolution was appropriate and agreed on a plan that they would present for the review of Attorney General Reno on April 12.

51. On April 12, the FBI submitted to Attorney General Reno a "Briefing Book" which contained a revised operations plan as well as background information on the standoff and information from behavioral psychologists indicating that it was unlikely that Koresh would voluntarily surrender. Under this plan, from the outset the FBI would tell the Davidians (by telephone or loudspeaker) that it was inserting tear gas to force the Davidians out, that the FBI was not assaulting the complex, that the Davidians should not use their weapons, and that they must stay out of the tower area. Two CEV's would deliver tear gas into the complex in a gradual, but systematic fashion. If the CEV's took gunfire, the FBI would immediately accelerate the plan to an all out insertion of tear gas by using HRT personnel

in Bradleys to shoot Ferret rounds into the complex. The CEV's would continue to insert tear gas with canisters mounted to their booms. The plan provided that the tear gassing would continue for 48 hours or until all Davidians had exited the complex. The FBI's standard deadly force policy, which allowed FBI agents to use deadly force only "in self-defense, the defense of another, or when they have reason to believe they or another are in danger of death or grievous bodily harm" would apply. If the Davidians had not exited after 48 hours, the FBI would use a CEV with a modified blade to peel back the walls and dismantle the complex.

H. The FBI Obtains Final Approval from Attorney General Reno to Implement the Tactical Plan.

52. On April 12, officials from the FBI met with officials from the Department of Justice to present the proposed tear gas insertion plan. Attorney General Reno participated in a second meeting at the FBI SIOC later in the day. Interviews regarding this meeting, along with contemporaneous notes, indicate that the FBI described the plan in detail. FBI officials presented the plan as controlled and gradual, possibly lasting up to 48 hours. Attorney General Reno asked why the FBI had to act at that particular time. In response, the FBI emphasized that the Davidians were not coming out and the FBI had to increase the pressure on them. Participants at the meeting also discussed cutting off the water supply to the complex, but concluded that this tactic was not feasible. Attorney General Reno raised additional questions about the availability of gas masks, the effects of tear gas on Davidians, particularly on the children, and the availability of medical facilities. The FBI told her that there were probably no tear gas masks available for children, but that the tear gas would not cause them permanent harm. They

discussed a plan to establish three detoxification units to help people who exited the complex, and told Attorney General Reno that pediatricians would be present during the tear gas operation. Other issues raised at the meeting included whether the plating on the tanks was sufficient to protect HRT personnel from .50 caliber weapons, what to do if the Davidians emerged from the complex shooting, what to do if they did not exit at all, and whether the plan should be delayed if Koresh's attorney requested more time. The meeting concluded without any resolution or decision by Attorney General Reno. During the next several days, Attorney General Reno and her staff sought additional information from numerous sources to supplement the responses provided to her by the FBI.

53. In accordance with the instructions of President Clinton that he be notified of changes in the FBI's strategy at Waco, Hubbell met with White House officials on April 13 to notify them of the proposed tear gassing plan. He informed White House officials that Attorney General Reno had not decided whether to implement the plan. White House Counsel Bernard Nussbaum briefed the President on the situation.

54. FBI Director Sessions convened a meeting on April 14 during which military experts addressed Attorney General Reno's questions and concerns regarding the tear gas plan. The FBI requested the presence of Gen. Schoomaker, a Special Forces colonel, and a toxicology expert employed by the Department of Defense. After Gen. Schoomaker's superiors approved the assignment, he drove to Waco where HRT commander Rogers gave him an aerial tour of the complex. They then landed at the forward TOC, and Rogers showed Gen. Schoomaker the communications

center and the medical facilities. The two then flew to Ft. Bragg, picked up the Special Forces colonel, and continued to Washington, D.C. On the way to Washington, Rogers asked Gen. Schoomaker to review and comment on the tear gas insertion plan and Gen. Schoomaker told him that he could not do that.

55. During the April 14 meeting with Attorney General Reno and her staff, the toxicologist reported on the effects of CS gas, concluding that it posed no risk of permanent harm to the inhabitants of the complex. The discussion at this meeting is reflected in interview notes and in a memorandum prepared by the Special Forces colonel after the meeting. Attorney General Reno asked repeatedly about the dangers that tear gas posed to the children in the complex. The toxicology expert reassured her that the long-term danger to the children was minimal. The military personnel present noted, however, that the effects of CS gas were unpredictable, that the natural impulse would be to exit the building, but that people could behave irrationally when exposed to tear gas. When asked to comment on specific, tactical aspects of the plan, Gen. Schoomaker responded, "[w]e can't grade your paper." The military representatives did, however, note that a military operation would be quite different in that a military assault would be rapid, violent, and would focus on killing the leaders. They further indicated that the military would insert the tear gas all at once.

56. The military experts also raised the possibility of a fire, noting that the British SAS had burned down a building during a tear gas operation in London. The FBI assured Attorney General Reno

that the means of delivery of the tear gas would be non-pyrotechnic.[72] According to Attorney General Reno, either at this meeting or later in the week, she gave an express directive that no pyrotechnic tear gas was to be fired "at the compound"– a phrase that was never clearly defined to include such areas as the concrete construction pit, the pool, and the underground bus located outside the main structure of the complex, but which Attorney General Reno meant to cover all of these areas.

57. Finally, the participants at the April 14 meeting discussed the issue of timing. Attorney General Reno asked again, "Why now?" The FBI told her that (a) there was no reason to believe that Koresh would come out voluntarily, (b) the health and safety of the children was in jeopardy, and (c) the effect of a prolonged standoff on the HRT was an issue. The Special Forces colonel also suggested that the HRT may need to stand down for retraining. Rogers opposed this suggestion. He told Attorney General Reno that the HRT had breaks during the siege, and was not fatigued or in need of retraining. He agreed, however, that if the siege continued for several more weeks, it might be necessary to pull the HRT back for retraining. At the end of the meeting, Attorney General Reno still had not decided whether to approve the plan.

58. Following further discussions among her staff, Attorney General Reno called Assistant United States Attorney Ray Jahn to inquire about conversations picked up by the Title III intercepts which indicated that the water supply at the complex might be running low. FBI agents again assessed

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[72]People at the meeting do not remember hearing the word "pyrotechnic" but it was clear that the means of delivery to be used would not start a fire.

the water supply issue, and concluded that the Davidians had plenty of water and had enough food to last a year. Attorney General Reno also directed Hubbell to contact negotiator Sage directly to obtain his assessment of the likelihood of a negotiated resolution. On April 15, Sage advised Hubbell that negotiations were at an impasse, and that a negotiated solution was unlikely in the short term. Sage told Hubbell that the only people who had left the complex were people whom Koresh wanted to leave.

59. On Friday, April 16, Attorney General Reno advised Hubbell that she had decided not to approve the plan at that time. This decision set off a series of meetings among Department of Justice and FBI personnel. Ultimately, Director Sessions appealed directly to Attorney General Reno, and requested that she reconsider her decision. After further considering the issue, Attorney General Reno changed her mind. She indicated that she was inclined to approve the plan, but wanted to see an even more detailed discussion of the plan and substantial supporting documentation setting out the conditions inside the complex, the status of negotiations, and the reasoning behind the plan. According to Attorney General Reno, she ultimately changed her mind because she was convinced that the Davidians would not come out voluntarily. She felt that the FBI would eventually have to go forward with some plan, and that it was better to proceed when the FBI was ready and best able to control the situation.

60. Senior Department of Justice and FBI officials worked together to prepare the documentation requested by Attorney General Reno. The materials that they prepared included the written opinion of behavioral psychologist Dr. Dietz that negotiations were not likely to resolve the crisis and that Koresh would probably continue to abuse the children. FBI and Department of Justice officials

met again on April 17 to review the plan, the supporting documentation, and the rules of engagement. Attorney General Reno approved the plan at approximately 7:00 p.m. Waco time (8:00 p.m. Washington time), and Jamar notified Rogers that the plan had been approved at 7:17 p.m. Attorney General Reno informed President Clinton of her decision to approve the plan on Sunday, April 18.

I. Activities Inside the Complex During the Days Preceding the Execution of the Tactical Plan.

61. As mentioned above, during the final days before the execution of the plan, Koresh told negotiators that he was writing an interpretation of the Seven Seals. Even as Koresh claimed he had finished interpreting the First Seal, Schneider acknowledged that he had not seen any work product. Koresh sent a letter out on April 14 indicating that he would surrender when he finished writing his interpretation of the Seven Seals. However, FBI behavioral scientists concluded that this letter constituted another empty promise by Koresh and, accordingly, Attorney General Reno did not put credence in Koresh's letter. Koresh would not give any credible or consistent timetable for surrendering, leading to a consensus among FBI officials that he had no intention of exiting the complex.

62. On April 16, the Davidians displayed a sign outside a window on the east or red side of the complex that said, "The flames await Isaiah 13." On April 17, Title III intercepts captured a conversation (unintelligible at the time) among Davidians concerning their plan to prevent fire trucks from reaching the complex: "You're definitely right . . . I think all the time he knows it . . . nobody comes in here;" ". . . bring the fire trucks and they couldn't even get near us;" "Exactly." As the FBI cleared the

area in front of the complex of cars and other obstructions on April 18, the Title III intercepts picked up a conversation between Davidians in which Schneider said "you always wanted to be a charcoal briquette." The other responded, "I know that there's nothing like a good fire . . ."

J. The FBI Initiates the Tactical Plan on April 19.

63. The events of April 19 are well-chronicled in numerous logs, timelines, audio, and video transmissions prepared contemporaneously, as well as numerous reports prepared after the fact. Throughout the standoff, including April 19, the agents kept a typed log of their observations of the activities at the command center in the rear TOC and a handwritten log at the forward TOC. The FBI negotiators kept logs, and the FBI leadership in Washington, D.C., kept a SIOC log. The following events are relevant to the Attorney General's Order to the Special Counsel.

64. Prior to April 19, the FBI had equipped each of two CEV's with tear gas canisters mounted on a boom extending from each CEV. CEV-1 had four refillable canisters of tear gas. CEV-2 had two refillable canisters of tear gas mounted so that its boom could reach the second floor of the complex. In addition, a CEV was equipped with a rail which could be used to remove the siding from a building. The FBI also equipped HRT agents in four Bradleys with M-79 grenade launchers to shoot non-pyrotechnic Ferret tear gas rounds. HRT Supervisory Special Agent McGavin commanded a tank retriever, designated the Staff Command Vehicle. McGavin and his team established a rally point for exiting Davidians southeast of the complex, and raised a large flag containing a red cross at that location.

Two additional Bradleys occupied blocking positions, and two others were on standby to be used for medical evacuation. HRT commander Rogers occupied an Abrams tank.

65. The Sniper Teams remained at Sierra-1 and Sierra-2 where they were joined by machine gunners from the HRT Golf and Echo teams. A medical evacuation Bradley moved to Sierra-2 shortly after the commencement of the operation. Three FBI snipers occupied Sierra-3. The seven SWAT teams provided perimeter security and medical response security. According to the medical annex to the FBI's operational plan, the plan was "designed to provide the best care possible for mass casualties which could potentially result from an explosion or other catastrophic event" at the Branch Davidian complex. Attorney General Reno had requested that medical support be available for every man, woman and child in the complex. In short, the plan called for a "transfer point" near the "T intersection" where casualties were to be evaluated and initially treated before being transferred to a "medical staging area" located at the entrance of the Forward TOC area located near the "Y intersection." From there, the plan called for helicopters to be available to rush critical patients to one of a number of civilian medical facilities. The FBI effectuated this plan on April 19.

66. The CEV's approached the complex at 6:00 a.m. Sage telephoned into the complex, eventually reaching Schneider, telling him that a tactical operation was about to begin, but that it was not an assault. At 6:05 a.m., the Davidians threw the phone outside the complex, probably because it had been disconnected when a CEV ran over the line. At that point, Sage made an announcement through a public address system (an announcement that he repeated many times during the morning), stating that

the FBI had begun to insert tear gas, that the FBI was not assaulting the complex, and that the Davidians should exit the complex and walk toward the flag with the red cross.

67. In accordance with the operations plan, CEV-1 punched its boom into the complex and discharged the first canister of tear gas into the first floor at a location designed to prevent the Davidians from moving to the underground bus at the green side of the complex. CEV-1 then continued its tear gassing operation systematically as outlined in the plan.

68. As the first tear gas insertion occurred, at 6:05 a.m., HRT Sniper Lon Horiuchi stationed at Sierra-1, saw what he believed to be green tracer rounds emanating from the complex toward the CEV. He radioed to the FBI commanders the word "compromise," meaning that the FBI was taking fire from the Davidians. Numerous FBI agents and other witnesses saw or heard gunfire coming from the complex, and some of these observations are recorded in the various FBI logs referenced above. Davidian gunfire continued sporadically throughout the morning. No logs or radio transmissions indicate that the FBI returned fire. At 6:17 a.m., the on-scene FBI leadership questioned the agents at various positions around the complex to learn whether they were returning fire. They all responded that they were not.

69. CEV-1 continued its insertion of tear gas, moving to the black side of the complex and eventually returning to a resupply area to refill its canisters. CEV-2 covered the red side, inserting tear gas until it too needed to refill its canisters. As a result of the calling of "compromise," the Bradleys

began firing non-pyrotechnic Ferret rounds into the main living quarters of the complex almost immediately after the operation began. The first targets were the tower and windows from which Davidians were firing at the CEV's. Then the Bradleys began a more systematic process of attempting to fire Ferret rounds into all the windows at the complex.

70. By 6:27 a.m., Rogers announced that the FBI had tear gassed all windows in the complex. Due to the combination of high winds, the failure of some Ferret rounds to penetrate into the complex and/or discharge their tear gas, and the use of gas masks by some Davidians, the tear gas appeared to have little effect upon the inhabitants. No one exited. A Title III intercept recorded a Davidian asking at 7:50 a.m., "[h]ave we been gassed?" Other intercepts record some Davidians speaking without difficulty, indicating that they had suffered no seriously ill effects from the tear gassing operations at that time.

71. At 6:44 a.m., at the request of Rogers, Sage announced to the Davidians that, if they did not exit within two minutes, the FBI would resume tear gassing operations. When no one exited, Jamar and Rogers ordered a second round of tear gassing with Ferret rounds to begin. The FBI soon ran low on Ferret rounds and made efforts to locate additional rounds. The tear gassing continued throughout the morning, with planned breaks, and with repeated announcements by Sage that the Davidians should exit the complex. The FBI fired a total of 389 Ferret rounds into the complex during the entire April 19 operation; in addition, the FBI delivered 20 canisters of tear gas during the entire operation.

K. The FBI Fires Three Pyrotechnic Tear Gas Rounds at the Concrete Construction Pit on the Green Side of the Complex.

72. Early in the morning, the Charlie Team Bradley unsuccessfully attempted to deliver Ferret rounds into the concrete construction pit on the green side of the complex. The Charlie Team made the attempt to prevent Davidians from hiding in the concrete construction pit which was connected to the main structure by a buried bus and an underground tunnel. At approximately 7:45 a.m., the Charlie Team Leader requested permission from McGavin to fire military tear gas rounds– which had better penetration capability– toward the concrete construction pit on the green side of the complex. Unlike a Ferret round, a military tear gas round delivers the tear gas through pyrotechnic means.

73. At 7:48:52 a.m., McGavin radioed Rogers and told him that he thought that the FBI could penetrate the concrete construction pit with a military tear gas round. Rogers gave permission to McGavin to fire military tear gas rounds although he suggested that they may not work due to water in the structure. Rogers has subsequently claimed that he believed that firing pyrotechnic tear gas at the concrete construction pit did not violate the instructions of Attorney General Reno because the concrete construction pit was not part of the flammable wooden living structure of the complex. The Bradley moved into position, and the driver dropped the back door. Special Agent Corderman used the back door of the vehicle as a platform from which to fire the military tear gas rounds. He fired three rounds at approximately 8:08 a.m. but immediately saw that they had bounced off the roof of the concrete construction pit. One landed between the concrete construction pit and the Sierra-2 sniper position and the other two landed just to the right side of the concrete construction pit. All three rounds came to rest

harmlessly in no position capable of starting a fire in the complex. The firing of the military tear gas rounds was not recorded on any log on April 19. However, the radio transmission at 7:48:52 a.m. was recorded by the Nightstalker aircraft as follows:

HRT-2: HR-2 to HR-1.

HRT-1: Go ahead, this is HR-1.

HRT-2: Currently re-supplying Charlie-1 . . . relative safety, ah, utilizing the vehicle for cover and attempt to get . . . penetrate the construction project.

HRT-1: You're talking about the black over top of the construction?

HRT-2: Say again HR-1.

HRT-1: Are you saying he can penetrate the black covering over the construction on the green side?

HRT-2: 10-4 . . . He thinks he can get in a position of relative safety, utilizing the track for cover and attempt to penetrate it with military rounds.

HRT-1: Roger. Of course, if there is water underneath, it's just going to extinguish them, but you can try it.

HRT-2: 10, 10-4, copy you can try it.

HRT-1: Yeah, that's affirmative.

The FBI did not fire any other military tear gas rounds at Waco on April 19.

L. The FBI Breaches the Complex.

74. At 9:01 a.m., Rogers radioed that he did not want the vehicles to insert tear gas into the front door of the complex because he wanted to create an escape route for the Davidians. At 9:12 a.m., a CEV pushed in the front door that the Davidians had blocked with a piano, after which, at 9:19 a.m., both Rogers and McGavin stated by radio to the vehicle drivers that the HRT should not insert tear gas into the front door so that the Davidians could avail themselves of the newly created exit route.

75. Between 9:30 a.m. and 10:00 a.m., Rogers, Jamar, and McGavin (and for some of the time Swenson) met at the "Y" intersection outside the complex to discuss the ineffectiveness of the tear gas inserted thus far. They agreed that they would penetrate deeper into the complex in order to increase the effectiveness of their operation. While the plan only allowed for the systematic dismantling of the complex after the passage of 48 hours, the FBI on-scene leaders determined that they would need to penetrate the building to effectuate their tear gas delivery. Jamar and Rogers believed the occupants of the complex had taken shelter near the concrete bunker beneath the tower. Since the Bradley M-79 tear gas gunners could not otherwise reach this area, Rogers decided to order the breach of the building from the front and rear with the CEV's in order to deliver tear gas to this area.

76. After refilling the tear gas canisters the second time, CEV-2 lost its tread and its crew then occupied CEV-3, which was not equipped to deliver tear gas. CEV-3 drove to meet Rogers, who was in the Abrams tank, at which time Rogers instructed the crew to go to the black side of the complex and

use the boom and blade to create a path to the tower. Rogers and the crew of CEV-3 have stated that the purpose of this operation was to create a driveway to the main tower so that CEV-1 could insert tear gas close to the tower.

77. The FBI Nightstalker surveillance aircraft captured the CEV penetration activity on its Forward Looking Infrared ("FLIR") thermal imaging system which had provided the audio recording of the radio transmissions concerning the authorization for the use of military tear gas rounds and the opening of an escape route through the front door. It also provided video of the front door being pushed in by the CEV. The video from the early morning FLIR was obscured by considerable cloud cover. By the time the operation to deliver tear gas to the tower began, the cloud cover had lifted and the images were relatively clear. At 10:41 a.m., the beginning of the second shift, the operator failed to engage the audio, although the video remained operational.

78. At 11:18 a.m., CEV-3 made contact with the wall on the black side of the gymnasium. Its mission was to clear a path through the gymnasium (which the Davidians used as a storage area) to the tower, so that CEV-1 could then deliver tear gas. At 11:20 a.m., CEV-3 pushed through the wall of the gym, and then exited. At 11:21 a.m., the CEV entered again. The entries were slow and problematic because the driver feared a drop off or ledge, and encountered a large number of stored items that created obstacles. He also stated that he feared that Davidian snipers might be located in the catwalk at the top of the gymnasium. On the eighth entry, the CEV went completely inside the gym so that the front

of the CEV (or the debris it was pushing) protruded from the front of the gym. At 11:27 a.m., the CEV clipped a beam, causing the gym roof to collapse.

79. The effort to reach the tower continued for over a half an hour longer, and included penetrations into the white side of the complex by CEV-1 as well, with portions of the structure continuing to collapse throughout the process. At about 11:30 a.m., the driver of CEV-1 penetrated the building on the white side perpendicular to the tower or concrete bunker area. Over the next twenty minutes, CEV-1 entered and backed out of the building three times. As the vehicle backed from the building, the operator used the blade to drag debris from the area. Again, the penetrations of the building were slow and methodical as the driver feared there may be a basement or drop off beneath the structure and the vehicle would become stranded. During this operation, the CEV-1 operator had swivelled the boom to the rear and, at 11:50 a.m., after repositioning the boom, CEV-1 entered the structure once again to insert tear gas into the tower area. After inserting the tear gas, and on the command of Rogers, CEV-1 returned to the front door and again penetrated this area. A short time later, at about 11:54:26 a.m., CEV-1 again penetrated the front door area and inserted a canister of tear gas. At about 11:57 a.m., Jamar ordered the CEV to clear this area to allow the occupants to exit quickly and safely. CEV-1 then made several additional entries into the front door area. At 12:05 p.m., Rogers ordered the CEV to deliver tear gas to the white/red corner, and the CEV departed the area of the front door. Throughout this operation, the FBI FLIR tapes showed rapid "flashes" on and around the complex and the vehicles. These flashes were solar reflections off of certain types of debris, including glass, that was strewn around the complex.

M. The Davidians Prepare to Start the Fire.

80. During the early part of the execution of the FBI's tear gas insertion plan, the Title III intercepts recorded Davidians making references to getting gas masks; and they recorded the sounds of people loading guns, and moving to different parts of the complex. The Davidians commented on the "good" wind dispersing the tear gas, and opened windows to ventilate the complex further. The Title III intercepts also recorded sounds consistent with gunfire emanating from within the complex to positions outside the complex.

81. As early as 6:05 a.m., the Title III intercepts picked up conversation indicating that the Davidians were pouring fuel and preparing to light the complex on fire. The Title III monitors at the rear TOC were unable to understand these conversations, which remained largely unintelligible until they were professionally enhanced after the standoff. Because these conversations bear directly on the issue of who started the fire, some of them are included below. They indicate that the Davidians began pouring fuel early in the morning on April 19, and that they prepared to start a fire at several different times during the tear gassing operation.

82. At 6:09 a.m, the intercepts recorded the following conversation among a group of Davidians:

Unidentified Male: Have you poured it yet?

Unidentified Male: Hm.

Unidentified Male: Did you pour it yet?

Unidentified Male: In the hallway . . . yes.

Unidentified Male: David said pour it right?

Unidentified Male: D'you need . . .

Unidentified Male: Come on let's go.

Unidentified Male: David said we have to get the fuel on.

Unidentified Male: Does he want it poured already?

Unidentified Male: We want the fuel.

Unidentified Male: Yeah.

Unidentified Male: We want some here.

83. At 6:15 a.m., the intercepts recorded this conversation:

Unidentified Male: Have you got the fuel . . . ready?

Unidentified Male: I already poured it.

Unidentified Male: It's already poured.

84. At 6:22 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: Nobody comes in huh?

Unidentified Male: Nobody's supposed to come in.

Unidentified Male: Right.

Unidentified Male: They got some fuel around here.

Unidentified Male: Yeah . . . We've been pouring it.

Unidentified Male: Pouring it already.

Unidentified Male: We've got it poured already.

85. At 7:08 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: That's good . . .

Unidentified Male: Real quickly you can order the fire yes.

Unidentified Male: Yeah.

86. At 7:20 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: You've got to put the fuel in there too.

Unidentified Male: Is it dry?

Unidentified Male: Hey let's put loads of fuel in there.

Unidentified Male: Fuel.

87. At 7:21 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: Is there a way to spread fuel there?

Unidentified Male: OK . . . what we do . . . . You don't know.

Unidentified Male: I know that won't spread . . . get some more.

Unidentified Male: So we only light it first when they come in with the tank right . . . right as they're coming in?

Unidentified Male: Right.

Unidentified Male: That's secure . . . . We should get more hay in here.

Unidentified Male: I know.

88. At 7:23 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: You have to spread it all so get started OK?

Unidentified Male: Yeah . . . got some cans there.

Unidentified Male: Right here . . . two cans here . . . and that's . . . and the rest can take em . . .

89. At 11:27 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: There isn't any reason to go out there.

Unidentified Male: No.

[Vehicle noise]

Unidentified Male: Do you think I could light this soon?

Unidentified Male: They're bringing it right to the middle of the . . .

Unidentified Male: Whoa . . . whoa.

90. At 11:42 a.m., the intercepts recorded the following conversation among the Davidians:

Unidentified Male: We're near the point where we oughta be . . .

Unidentified Male: We've no . . . we're not to blame for that . . . . We're not to blame.

Unidentified Male: Looks to me that you gotta . . .

Unidentified Male: You'll have to deal with that.

Unidentified Male: Go and get the kids.

Unidentified Male: They'll go for the barn.

Unidentified Male: I want a fire on the front . . . you two can go . . .

91. Then, at 11:54 a.m., an unidentified male stated: "Keep that fire going . . . keep it." This was the last statement intercepted before the listening device ceased operating.

92. At approximately 12:06 p.m., an FBI agent observed a white male wearing a gas mask just inside of the front door area of the complex. The individual had a long rifle in his right hand and was walking from east to west holding something in his left hand. An overturned piano obstructed the FBI agent's view of the individual's hands and body, but the agent later concluded that the individual's movements were consistent with those of a person spreading fuel within the complex. Also, the FBI agent observed the unidentified individual ignite a fire in the front door area of the complex. The agent reported his observation contemporaneously.

93. An FBI agent, who had a clear view into the chapel area, observed two individuals making movements which were consistent with the spreading of fuel. The FBI agent was located at a sniper/observer position approximately 180 yards from the southeast corner of the complex. The FBI agent was using binoculars and a spotting scope at the time of his observation. Seconds before smoke

became visible on the second floor of the southeast tower, a SWAT agent observed a white male repeatedly bending over in the second floor room of the southeast tower where the fire ignited. The agent was located at a position on a hill approximately 900 meters from the east side of the complex, and was using field glasses at the time he made his observation. From within the complex, Davidian Graeme Craddock observed an unidentified individual pouring Coleman fuel in the chapel area of the complex. Craddock also overheard Pablo Cohen tell the unidentified person to pour the fuel outside rather than inside. A few minutes later, Craddock heard Mark Wendell say "light the fire," and, in response, Cohen stated "wait, wait, find out." At that time, Cohen and Wendell then had a conversation which Craddock could not overhear.

N. Fire Starts at the Complex and Nine Davidians Exit.

94. At 12:06 p.m., CEV-1 moved from the southeast corner of the complex toward the road. Moments later, at 12:07 p.m., the FLIR tape shows a visible fire signature in a second floor room at the southeast corner of the complex. The FLIR tape shows a second visible fire signature in the dining room area at 12:08 p.m. The FLIR video shows a third visible fire signature in the stage area at the rear of the chapel.

95. As the fire began to spread, FBI agents heard gunfire within the complex. They stated that some of the rounds sounded "cooked off" by the heat, but that others were rhythmic in nature, leading some of the agents to conclude at the time that the Davidians were committing mass suicide.

96. Shortly after the fire began in the southeast corner of the complex, Davidians David Thibodeau, Derek Lovelock, Jamie Castillo, and Clive Doyle exited the chapel. Doyle had injuries on both sides of his hands consistent with liquid fuel burns. Graeme Craddock exited the chapel area through a window, entered the rear courtyard, and concealed himself in a concrete structure at the base of the water tower. He was not arrested until 3:30 p.m. At 12:16 p.m., Davidian Renos Avraam exited to the roof. HRT agents attempted to help him to safety, although he resisted. Similarly, Davidian Ruth Riddle jumped from the white side roof but then reentered the complex. Special Agent James McGee exited his secure position in a Bradley, ran into the flaming building, and rescued Riddle against her will. Once Riddle was safely outside of the complex, McGee questioned her regarding the location of the children within the complex, but Riddle refused to answer. Marjorie Thomas and Misty Ferguson, who fell or jumped from the second floor on the white side of the complex, were badly burned. According to one of the Secret Service paramedics who treated her, Marjorie Thomas was in respiratory arrest and would have died had she not received the immediate medical care provided to her. During the course of the fire, a total of nine Davidians exited the complex. These Davidians were initially treated in the fortified medical position near the "T intersection" and then, transported to the rear medical area field hospital. The severely burned victims were flown by MedEvac helicopter to Parkland Hospital in Dallas, Texas.

97. The FBI combined log reports the first observation of fire at 12:10 p.m. At 12:13 p.m., fire department assistance was requested. Within 18 minutes of the first observation of fire, the entire complex was engulfed in flames. Jamar permitted firefighting vehicles to approach the complex at 12:34

p.m. He has stated that he waited until then because of fear for the safety of the unarmed firefighters. Rounds continued to cook off inside the complex after the firefighting trucks were on the complex premises putting out the fire.

98. At 1:00 p.m., several HRT agents entered the concrete construction pit, waded through waist high water contaminated with sewage and rats, and reached the underground bus to search for survivors. Several FBI searchers, including HRT commander Rogers, entered the concrete construction pit with the hope that the children were hiding in the underground bus. They found none. They also could not open the trap door leading from the underground bus to the living quarters because it was covered with debris.

O. The FBI and the Texas Rangers Investigate the Crime Scene.

99. At approximately 4:00 p.m. on April 19, the FBI permitted the Texas Rangers (with assistance from the Texas Department of Public Safety) to begin their efforts to secure the scene and gather evidence. The Rangers maintained security around the remains of the complex. Captain David Byrnes, among others, supervised the securing of the scene pending the implementation of a search protocol. Smoldering remains from the fire delayed the processing of the scene for three days. During that time, because of the heat, ammunition continued to "cook off" and cans of food exploded.

100. Although the Texas Rangers had principal responsibility for organizing the search for evidence, numerous federal and state agencies and agency components participated in the gathering and

analysis of evidence from the scene. They included representatives from the Laboratory Division of the FBI, the Tarrant County Medical Examiner's Office, the Houston Fire Department's Arson Division, the United States Attorney's Office for the Western District of Texas, the Texas Department of Public Safety Crime Laboratory, ATF, and the Smithsonian Institution. During the first few days after the fire, the Rangers led several coordination meetings with the representatives of these entities to ensure the orderly processing of evidence.

101. On April 20, explosive experts from ATF and the FBI searched the remains of the complex for explosive devices. FBI Supervisory Special Agent Wallace Higgins, an explosive and hazardous device examiner, located two military tear gas projectiles adjacent to the east side of the concrete construction pit. Higgins, concerned that one of the rounds might still contain tear gas, fired a handgun at the projectile in an attempt to render it safe. He did not retrieve either of the projectiles. No one logged these projectiles into evidence.

102. On April 22, the crime scene search personnel met at Ft. Fisher Texas Ranger Museum to reach a consensus on how to proceed. They decided to divide the complex grounds into gridded sectors so that people making use of the evidence in the future would know where each piece of evidence had been found. The grid contained 21 lettered sectors, from "A" to "W," excluding the letters "Q" and "K." Six teams, each led by a Ranger, gathered and catalogued evidence. Photographers took pictures of key evidence before agents removed it. However, there were more grids than photographers, so each photographer covered more than one grid. As bodies were found, they were

tagged, removed from the crime scene to a staging area, and subsequently loaded onto a refrigerated truck and transported to the Tarrant County Medical Examiner's Office.

103. On April 23, during the search for evidence, Sergeant George Turner, a Texas Ranger, recovered an expended shell casing from a pyrotechnic tear gas round in Sector E, grid EC1. The FBI laboratory labeled the shell item Q1237. Sgt. Turner stated that he discussed the find with FBI Supervisory Special Agent Rick Crum who said he would try to determine its origin. The shell casing recovered by Sgt. Turner is a component part of a 40 millimeter tear gas round referred to as a military tear gas round or XM651E1. According to Sgt. Turner, Crum informed Sgt. Turner in 1994 at the criminal trial of the Davidians that the shell casing that Turner found in April was from a military casing that had been fired by the FBI. Also according to
Sgt. Turner, Crum stated that his inquiries had revealed that the FBI had fired the round in an effort to knock down a door and that FBI on-scene leadership had given permission to fire the round.

104. As the crime scene search continued, the Rangers were cataloguing thousands of pieces of evidence and retrieving thousands of pounds of additional materials. Additionally, the Rangers conducted a line search on April 30 involving 53 law enforcement officials who lined up fingertip to fingertip and searched the area outside the main structure of the complex. On April 30, a crime scene photographer took a photograph of a military tear gas projectile 200 yards northwest of the water tower. This projectile was not inventoried as evidence and extensive searches have failed to locate it.

105. On May 12, the Rangers loaded the evidence into a truck. The evidence recovered by Rangers from the Davidian complex included 300 rifles and shotguns, including two .50 caliber BMG rifles, 34 AR-15 assault rifles, 61 M-16 assault rifles, 61 AK-47 rifles, and 5 M-14 rifles. More than 40 of these rifles were fully automatic. Additionally, the Rangers recovered 60 pistols and thousands of pounds of live and spent ammunition. On May 15, they delivered evidence to the FBI Crime Laboratory in Washington, D.C. On May 17, the chain of custody was formally transferred to FBI Special Agent Jim Cadigan of the FBI Crime Lab. The FBI returned the evidence to the Rangers on various dates but most had been returned by December 3, 1993.

106. On April 19, 1993, at the direction of the Department of Justice, ATF assembled an independent team of fire investigators. The team consisted of Assistant Chief Investigator Paul Gray, Houston Texas Fire Department; Senior Investigator William Cass, Los Angeles City California Fire Department; Investigator John Ricketts, San Francisco California Fire Department; and Deputy Fire Marshal Thomas W. Hitchings, Allegheny County Police Fire Marshal's Office. Also, Drs. James Quintiere and Frederick Mower were retained in order to conduct a fire development analysis.

107. The fire investigation team conducted a nine-day on-site investigation beginning April 21, 1993, and continuing until April 29, 1993. On April 22, 1993, prior to gaining access to the crime scene, the fire investigation team viewed news media video recordings of the fire and discussed the possibility that fires had ignited in three separate areas almost simultaneously. On April 23, 1993, the fire investigation team began the process of collecting potential evidence and identifying items to be sent

to the laboratory for analysis. An accelerant detection dog was used to determine which items were to be sent for laboratory analysis. The accelerant detection dog alerted agents to debris in the southeast corner area, the dining room area, and the chapel area, and to a number of articles of Davidian clothing.

108. The investigation resulted in the recovery of numerous Coleman fuel cans (some of which appeared to have been intentionally punctured), lanterns, and numerous articles of debris on which the laboratory detected the presence of flammable liquids. The laboratory was able to confirm the accelerant detection dog's alerts on debris in the chapel area and in the southeast corner area of the complex.

109. The fire team concluded that: the "fire was caused by the intentional act(s) of a person or persons inside the compound;" the "fires were set in three separate areas of the complex;" and "flammable liquids were used to accelerate the spread and intensity of the fire."

P. The Medical Examiners Determine the Cause of Death of the Davidians.

110. On April 19, the Tarrant County Medical Examiner's Office, led by Dr. Nizam Peerwani, the Chief Medical Examiner, prepared to conduct the autopsies of the Davidians. The Tarrant County Medical Examiner's Office first became involved with the events at Waco when Dr. Marc Krouse, the Deputy Chief Medical examiner, was called on February 28, 1993, and told to prepare for the autopsies of the four ATF agents killed during the initial gun battle. In early March 1993, Dr. Krouse performed these autopsies, and Dr. Peerwani conducted another autopsy on the body of Michael Schroeder, who had been killed in a gun battle with ATF agents late in the day on February 28.

111. On April 19, Dr. Peerwani activated his office's Mass Disaster Plan. Dr. Peerwani's office received the first body from the crime scene on April 19. On April 21, Dr. Peerwani and an odontologist from his office surveyed the crime scene. Between April 22 and April 29, Dr. Peerwani's recovery team, including a photographer, criminalist, pathologist and an anthropologist, assisted in the recovery of bodies. They developed a procedure for flagging, photographing and removing the human remains from the scene. Later Dr. Peerwani created a diagram showing the location where they found each of the bodies.

112. Over the next month, Dr. Peerwani and his staff conducted autopsies at the Tarrant County Medical Examiner's Office. Dr. Peerwani led a team of professionals including pathologists, anthropologists, FBI fingerprint examiners, and odontologists from various organizations. Until they could be examined, the bodies were kept appropriately cool to preserve any evidence suggesting their cause of death. After their examination, the bodies were kept in a freezer donated by the FBI to the Tarrant County Medical Examiner's Office.[73]

[73]Sometime after the examination, the freezer malfunctioned.

113. The examiners found 94 remains and labeled them MC-1 through MC-81,[74] with multiple remains included under one number in some cases such as MC-31A through MC-31F[75] and MC-67-1 through MC-67-8. Furthermore, because of the extensive heat damage and commingling of bodies, DNA analysis determined that several of the MC numbers were actually the same individual.[76]

114. The autopsy reports, DNA findings, and anthropological work indicated that at least 74 Davidians died on April 19, including at least 20 children under the age of 14 with a majority of children under the age of seven. On April 19, at least 20 Davidians were shot including at least five children under 14. Of the 20, 12 were shot in the head, two were shot in the head and chest, three more were shot in the chest only, two were shot in the back and one, Schneider, was shot in the mouth. In several additional instances, the pathologists could not confirm, but would not rule out gunfire, which indicates that more Davidians may have been shot. Additionally, one child was stabbed to death. Dr. Peerwani attributed most of the other deaths to inhalation of smoke and carbon monoxide and thermal burns due to the fire or suffocation due to overlay and burial in the structural collapse.

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[74]"MC" denotes "Mount Carmel" which is another name for the Branch Davidian complex. Dr. Peerwani devised this numbering system.

[75]For example MC-31A and MC-31B are Aisha Summers (who died of a gunshot wound) and her near term unborn child respectively, while MC-31D and MC-31E called MC31-DE are parts of the same fragmented skull of an 11 to 14 year old unknown child (who also died of a gunshot wound).

[76]For example, DNA analysis showed that MC-50 and MC-61 are the same individual, a child of Douglas Wayne Martin.

Q. The Department of Justice and Congress Investigate the Activities at Waco.

115. Immediately following the fire, FBI Special Agent in Charge and spokesman Robert Ricks announced at a press conference that the FBI had not used any pyrotechnic devices during the April 19 operation. Within days, Congress convened hearings, and on April 28, 1993, Attorney General Reno testified that she had been assured prior to the operation that the tear gas and its "means of use" were non-pyrotechnic. HRT commander Rogers sat behind her during this statement but did not inform her that the FBI had used pyrotechnic tear gas at the concrete construction pit. In addition, FBI Director Sessions testified that the FBI had chosen CS gas because the agents could deliver it without pyrotechnics. Rogers, also present during the testimony of Sessions, failed to correct any potential misimpression left by this statement.

116. Numerous investigations and inquiries followed, including a fire investigation and scientific fire analysis, Congressional hearings in 1993 and 1995, a 1993 Department of Treasury Report about the ATF's role in the Waco operation, and a 1999 GAO report on the use of the armed forces at Waco. Also, in 1993, the Department of Justice organized a series of inquiries into the Waco operation under the supervision of Deputy Attorney General Philip Heymann. This project was divided into four parts: (1) a factual review of the entire Department of Justice and FBI operation at Waco, (2) further review by a panel of experts who were asked to make recommendations based on the facts developed in the initial review, (3) a critical evaluation of the handling of the Branch Davidian standoff prepared by Edward S.G. Dennis, Jr., and (4) Deputy Attorney General Heymann's own report containing

recommendations for changes to better handle similar situations in the future. None of these reports or investigations found evidence of criminal wrongdoing by the United States or its agents at Waco.

117. Attorney General Reno asked Richard Scruggs, an experienced federal prosecutor, to conduct the factual inquiry into the activities of the FBI and Department of Justice at Waco, including the April 19 operation. Scruggs was an acquaintance of Attorney General Reno's who came to Washington, D.C., from Miami at her request to assist her in her new role. Deputy Attorney General Heymann asked Assistant United States Attorney Steven Zipperstein and a Department of Justice's Office of Professional Responsibility attorney, Robert Lyon, to work with Scruggs. The FBI's Inspections Division provided the investigative resources for the review. This effort was led by FBI Inspector Victor Gonzalez and Assistant Inspectors Herbert Cousins and Roderick Beverly. The FBI compiled memoranda of interviews (called "302's") and other documents. Scruggs and his team then drafted a summary of the beliefs of the Davidians and a narrative of the events occurring at Waco. Scruggs and his team did not conduct a formal investigation. They did not make efforts to determine or challenge the veracity of the statements of witnesses, nor did they test or challenge the FBI's widely publicized contention that it did not fire guns or use pyrotechnics during the standoff.

118. Scruggs and his team assumed from the outset that the Davidians, not the FBI, started the fire. While the Scruggs team did not specifically ask witnesses whether they used pyrotechnic devices at Waco, one FBI pilot told Scruggs' investigators that he had heard a radio conversation about the use of "some sort of military round" at the concrete construction pit. The other pilot in that same plane told

Scruggs' investigators that he observed a tear gas cloud form over the concrete construction pit. The investigators apparently attributed no significance to these statements. Scruggs issued his report, entitled "Report to the Deputy Attorney General on the Events At Waco Texas February 28 to April 19, 1993," on October 8, 1993. In a section entitled "False Accusations that the FBI Started the Fire," the report stated that "a nationally recognized team of arson experts [concluded that] . . . the gas delivery systems that the FBI used were completely nonincendiary." Further, the Scruggs report stated that the arson team "noted that the tear gas delivery methods that had been selected evidenced the FBI's concern for eliminating fire hazards." The report, while discussing military involvement at Waco, did not analyze the legality of the use of the Armed Forces of the United States.

R. The Department of Justice Prosecutes the Davidians.

119. On August 6, 1993, a federal grand jury returned a ten count superceding indictment charging twelve Davidians with various crimes arising out of their activities at the complex prior to February 28, during the 51-day standoff, and on April 19. The indictment named Kathryn Schroeder, Brad Branch, Kevin Whitecliff, Clive Doyle, Jaime Castillo, Livingstone Fagan, Paul Fatta, Woodrow Kendrick, Norman Allison, Graeme Craddock, Renos Avraam, and Ruth Riddle as defendants. The Davidians faced different charges, which included conspiracy to murder federal agents, aiding and abetting the murder of federal agents, using and carrying a firearm during and in relation to a conspiracy to murder federal agents, aiding and abetting an attempted murder of federal agents, illegally carrying an explosive grenade, conspiring to possess and manufacture machine guns illegally, and aiding and abetting Koresh in the illegal possession of machine guns. As part of the conspiracy count, the government

alleged that the Davidian defendants had deliberately set fire to the complex on April 19. One Davidian, Kathy Schroeder, pled guilty to one count of armed resistance of a federal officer; the remainder prepared to go to trial.

120. Assistant United States Attorney Ray Jahn was the lead prosecutor on the case. Assistant United States Attorneys Bill Johnston, LeRoy Jahn, and John Phinizy assisted him, along with Department of Justice attorney John Lancaster and paralegal Reneau Longoria.

121. On August 23 to 25, 1993, the prosecution team, including Ray and LeRoy Jahn, John Lancaster and John Phinizy, met with several members of the Texas Rangers and FBI Laboratory personnel, including Rick Crum, to discuss the ongoing analyses of the evidence recovered from the crime scene. During the meetings, LeRoy Jahn asked Crum to have a specific 40 millimeter shall casing analyzed to determine "what the original load was and marks of value." On August 25, 1993, Crum hand carried the casing to Washington for analysis by the FBI Laboratory. Crum identified the casing as a "grenade launcher cartridge case." This casing was labeled by the lab as Exhibit Q1237.

122. In November 1993, the government's criminal trial team made a trip to Quantico, Virginia, to interview members of the HRT who had participated in the events at Waco earlier that year. Before making the trip, the trial team viewed a recently released film produced by Linda Thompson entitled, *Waco: The Big Lie.* The film contained news footage showing an FBI agent shooting a grenade launcher from the back of a Bradley and, moments later, a cloud of tear gas rising from the area of the

concrete construction pit. Thompson claimed in the film that this footage showed that the FBI started the fire early in the morning of April 19. One reason for interviewing HRT members at Quantico was to hear their explanation of this footage.

123. The prosecutors showed the film to a large group of HRT members and then interviewed them in smaller groups. During the interview of the Charlie Team, Corderman told members of the trial team that the smoke shown in the film was not due to fire, but rather was a tear gas cloud from a military tear gas round that he had fired at the concrete construction pit. Corderman described the round as incendiary. Longoria wrote the word "incendiary" in her notes next to the description of the military round. Lancaster's notes also state "fired 1-4 incendiary rounds" and "1 military" round at the "ce-ment [sic] underground deal."

124. Members of the trial team also met with HRT commander Richard Rogers. LeRoy Jahn's notes reflect that Rogers told them that the FBI had used a "cupcake" round at the concrete construction pit, that he knew there was water in the concrete construction pit, and that the cupcake round had greater "penetrator" power than the Ferret rounds that had bounced off. Lancaster recalls that LeRoy Jahn asked Rogers what a cupcake round was and that Rogers explained that it was a military round. Longoria's notes from the same interview reflect that Rogers referred to the use of a "military tear gas round."

125. Back in Waco, the criminal trial team prepared outlines and witness charts reflecting that the HRT had fired "military" rounds at the concrete construction pit during the early morning hours of April 19. These documents indicate that the trial team decided to save this information for rebuttal in the event that the Davidians attempted to claim that the "smoke" in the concrete construction pit was the result of an igniting fire, rather than the use of tear gas.

126. The government's trial team did not disclose the use of the military tear gas rounds to the lawyers for the Davidians under *Brady v. Maryland* which requires prosecutors to provide the defense with exculpatory information. In the "Government's Response to Defendant Castillo's Specific Brady Requests," Ray Jahn stated, "[t]he government has no evidence that government agents fired gunshots on April 19, 1993, other than ferret tear gas rounds." However, the government provided the criminal defense team with a 49-page FBI laboratory report which referenced Q1237, the shell from a military tear gas round that the Rangers had located at the scene, and they also provided the defense with numerous photographs, including the photograph of a spent military tear gas projectile taken by the crime scene photographer at the crime scene.

127. During the trial, the prosecution sought to prove that the Davidians started the fire. Dr. Quintiere, the government's fire expert, testified that the fire started in three or four locations simultaneously, and another expert testified that the Davidians had spread accelerants throughout the complex. None of the prosecutors mentioned the FBI's use of pyrotechnic rounds several hours before the fire started. They continued to view this evidence only as rebuttal evidence. They did provide

testimony that the FBI had used Ferret rounds, and FBI HRT member Thomas Rowan testified that a Ferret round was "not a pyrotechnic."

128. On February 26, 1994, the jury acquitted the defendants of the conspiracy and murder counts but convicted five defendants of the lesser included offense of aiding and abetting manslaughter. Those convicted of aiding and abetting manslaughter were Renos Avraam, Brad Branch, Livingstone Fagan, Jaime Castillo, and Kevin Whitecliff. Brad Branch, Kevin Whitecliff, Jaime Castillo, Livingstone Fagan, Graeme Craddock, Renos Avraam, and Ruth Riddle were each convicted of using or carrying a firearm during a conspiracy to murder federal officers. Graeme Craddock was convicted of possessing an explosive grenade, and Paul Fatta was convicted of conspiring to illegally possess and manufacture machine guns and aiding and abetting the illegal possession of machine guns. Three Davidians, Clive Doyle, Woodrow Kendrick, and Norman Allison, were acquitted of all charges.

129. On June 17, 1994, the Honorable Walter S. Smith, Jr. sentenced Avraam, Branch, Castillo, Fagan, and Whitecliff to 40 years each in prison. Judge Smith sentenced Craddock to 20 years in prison, Fatta to 15 years, and Riddle to five years. Schroeder was sentenced to three years on July 8. The United States Court of Appeals for the Fifth Circuit affirmed the convictions on August 2, 1996. On June 5, 2000, the Supreme Court remanded the case to the District Court for resentencing, holding that the Davidians convicted of using or carrying firearms during and in relation to the ATF raid were improperly sentenced to 30 years for possession of machine guns because the jury had not found specifically that the defendants possessed machine guns.

S. Congress Holds Additional Hearings in 1995.

130. In July and August 1995, the United States House of Representatives held additional hearings on the Waco incident. The hearings were convened jointly by the Judiciary Committee's Subcommittee on Crime and the Committee on Government Reform and Oversight's Subcommittee on National Security, International Affairs, and Criminal Justice.

131. Upon learning that Congress intended to hold the hearings in 1995, Attorney General Reno asked Scruggs and Zipperstein to lead the Department of Justice effort to prepare for these hearings. Many in the Department of Justice viewed these hearings as a highly partisan effort to impugn the actions of Attorney General Reno and her staff.

132. On June 8, 1995, Congress submitted document requests to the Department of Justice, which included a request for "all records of or concerning pyrotechnic devices and incendiary weaponry, including a listing of all pyrotechnic and incendiary devices . . . used on April 19 . . . against the residence of Koresh and the Branch Davidians," as well as the names of persons who employed these devices. In response to an inquiry from the Department of Justice to the FBI concerning this request, a member of the FBI's Office of Public and Congressional Affairs wrote to Scruggs that "[t]here were no incendiary or pyrotechnic devices used against the Branch Davidians on 4/19/93." Numerous other documents prepared by the FBI and the Department of Justice to brief Attorney General Reno for her testimony, including a set of "Waco Fact Sheets," indicated that the FBI did not fire pyrotechnic devices on April 19, 1993. Attorney General Reno was not asked about pyrotechnic devices during the 1995

hearings, but Department of Justice witnesses told the Office of Special Counsel that the "Waco Fact Sheets" used to prepare for her testimony were produced to Congress. In addition, FBI and Department of Justice officials apparently told congressional staffers, and possibly even members of Congress, that no pyrotechnic devices were used.

133. In response to the document requests, Congress received the notes of Reneau Longoria from 1993 that reference the use of military round[s] and describe them as "incendiary," Longoria's notes from Rogers' interview which refer to a military round, and the criminal trial team's witness chart that references Corderman's statement to the criminal trial team in 1993 that the FBI had fired a military round/bubblehead. These documents do not use the word "pyrotechnic" to describe the military tear gas rounds.

134. Congress also requested the Department of Justice to produce the FBI FLIR tapes recorded from 6:00 a.m to 6:00 p.m. on April 19, 1993. In response to this request, the Department of Justice produced only tapes from the second shift, beginning at 10:42 a.m., maintaining that the government did not have tapes from earlier in the morning. The Department of Justice and FBI took a similar position in response to a lawsuit filed under the Freedom of Information Act seeking access to the FLIR tapes. An FBI Supervisory Special Agent submitted a sworn declaration which detailed all of the files that the FBI had searched for responsive information, and erroneously stated that the "earliest FLIR videotape recorded on April 19, 1993, occurred at approximately 10:42 a.m."

135. During the 1995 congressional hearings, prosecutor Ray Jahn submitted a written statement to Congress that "the FBI did not fire a shot, other than the nonlethal ferret rounds which carried the CS gas." No one questioned him about this statement, and the issue of the use of pyrotechnic devices did not surface during the course of the hearings.

136. The Committees issued a report on August 2, 1996, which concluded, among other things, that the FBI's strategy decisions during the 51-day standoff were flawed and "highly irresponsible" and the Attorney General's decision to assault the complex on April 19, 1993, was "premature, wrong, and highly irresponsible." The report also concluded, however, that the ultimate responsibility for the deaths at Waco lay with Koresh, and that the evidence indicated that some Davidians intentionally set fire to the complex. The report stated that there was no evidence that the FBI discharged firearms on April 19 or intentionally or inadvertently caused the fire. The report also exonerated the armed forces of any wrongdoing relative to the *Posse Comitatus* Act.

T. The Surviving Davidians and Relatives of Deceased Davidians File a Wrongful Death Lawsuit.

137. On March 21, 1994, the first of seven groups of surviving Davidians and relatives of deceased Davidians filed a wrongful death lawsuit against the United States and certain individual FBI and Department of Justice employees in the United States District Court for the Southern District of Texas, Houston Division. The seven cases were consolidated on January 16, 1996, and the various groups of plaintiffs filed a single consolidated complaint. Upon motion by the United States on April 4,

1996, the Court transferred the case to the Western District of Texas, Waco Division. The plaintiffs alleged that agents of the United States used excessive force on February 28, during the siege, and on April 19, and that they had failed to provide adequate emergency services and committed other intentional acts of misconduct or gross negligence in connection with their handling of the Davidian standoff at Waco in 1993. One such act alleged by the plaintiffs was that the government defendants caused "a fire in the Church which trapped and killed the [Davidians.]"[77]

138. In January 1996, the plaintiffs in the civil suit filed a declaration by their fire expert, Richard Sherrow, in support of their opposition to the government's motion to dismiss the complaint and specifically its motion to dismiss the plaintiffs' claims regarding the fire. Sherrow stated that:

> Besides the SGA-400 Ferret cartridges, information from documents obtained from the FBI through the United States Department of Justice

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[77]On July 14, 2000, after a four week trial, an advisory jury returned a verdict in the civil case. In its verdict, the advisory jury answered "no" to each of the following questions:

> Did the plaintiffs prove by a preponderance of the evidence that the Bureau of Alcohol, Tobacco and Firearms (ATF) used excessive force on Feb. 28, 1993, in either of the following respects?
>
> 1. by firing at Mount Carmel without provocation.
> 2. by using indiscriminate gunfire at Mount Carmel on Feb. 28, 1993.
>
> Did the plaintiffs prove by a preponderance of the evidence that the Federal Bureau of Investigation acted negligently on April 19, 1993, in one or more of the following respects?
>
> 1. by using tanks to penetrate Mount Carmel other than in accordance with the approved Plan of Operations on April 19, 1993.
> 2. by starting or contributing to the spread of the fire at Mount Carmel on April 19, 1993.
> 3. by affirmatively deciding to have "no plan to fight a fire" at Mount Carmel, despite Attorney General Reno's directive that required "sufficient emergency vehicles to respond both from a medical and any other point of view."

> indicates that military pyrotechnic munitions may have been fired into Mount Carmel. Documents disclosed indicate that agents could not penetrate either the underground shelter roof or the top of the rear four-story tower with Ferrets. Therefore, they fired at least one "military" round and referred to this munition as a "bubblehead."[78]

139. Marie Hagen, the Department of Justice attorney heading the civil case asked FBI attorney Jacqueline Brown for help in responding to these allegations. Brown in turn faxed the Sherrow declaration to the FBI Training Specialist Law Enforcement Chemical Agent, along with a note asking for assistance in responding to the declaration. The declaration was also provided to HRT Special Agent Robert Hickey. On February 15, 1996, Hickey sent a memorandum to Brown, stating in relevant part, that the FBI HRT Charlie Team had fired "[a] total of two (2) or three (3)" military rounds at the roof of the underground shelter outside the complex. He stated that the rounds were fired shortly after 6:00 a.m.,[79] bounced off the roof, and landed in the field behind the complex. Hickey noted that "the military CS rounds were prohibited from being fired into the main structure due to their potential for causing a fire." Brown read the memorandum and made notations regarding this paragraph.

140. The Department of Justice did not file a responsive pleading to the Sherrow Declaration in 1996 because it did not consider the allegations germane to the main issues in the case. In 1997, the

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[78]Document discovery in the civil case did not begin until July 1999. Therefore, the "documents" referred to by Sherrow came from other sources. Most likely, the documents were Longoria's notes which were produced to Congress in 1995, and the criminal trial team's witness chart which was produced to Congress in 1995 and to the plaintiffs in a related Davidian civil case in 1994. Both of these documents contain the term "bubblehead."

[79]In fact, the rounds were fired at approximately 8:08 a.m.

plaintiffs filed a supplemental declaration by Sherrow which again alleged that the HRT had used military tear gas rounds on April 19. In a brief filed on March 20, 1998, the government dismissed Sherrow's statement that the FBI fired pyrotechnic rounds on April 19, 1993, with a footnote stating that Sherrow "ignores the virtual arsenal gathered by the Davidians," clearly suggesting that the Davidians had fired the military tear gas rounds at the FBI. Brown reviewed the brief before it was filed. After the FBI publicly acknowledged using military tear gas rounds in August 1999, the Department of Justice filed a pleading withdrawing this statement.

141. As the civil lawsuit proceeded, Dan Gifford and Michael McNulty (among others) produced and released the film *Waco: Rules of Engagement*. The film included portions of the FLIR tapes from after 10:42 a.m. The producers noted the flashes emanating from the complex and around government vehicles which they claimed evidenced a gun fight between the government and the Davidians. The producers also noted objects on the FLIR tapes which they claimed were persons exiting the government vehicles and assuming positions to fire shots into the complex. The plaintiffs in the civil lawsuit seized upon this information to support their allegations that the government had contributed to the deaths of the Davidians by shooting into the complex, pinning the Davidians down, and preventing their escape. The government continued to assert that the FBI had not fired a single shot at Waco on April 19, 1993. Its experts stated that the flashes on the FLIR tapes were reflections from debris on the ground, a theory dismissed as impossible by the plaintiffs' experts.

142. In 1997, as part of the preparation of the defense in the civil litigation, various Department of Justice and FBI officials debated internally the desirability of conducting a test of the FBI's Nightstalker FLIR equipment to determine whether gunfire could appear on a FLIR tape and to determine whether debris could cause flashes on a FLIR tape. Those favoring the test noted that the FBI intended to upgrade its FLIR system soon and recommended that the test occur immediately. The test never occurred, and the FBI upgraded the equipment.

U. Events in 1998 and 1999 Lead to the Appointment of the Special Counsel.

143. On August 21, 1998, after consulting with Department of Justice public affairs officials, Assistant United States Attorney Johnston allowed McNulty, who was working on another Waco film, access to the Waco evidence storage facility. McNulty inspected the evidence on this and five subsequent occasions. During one of his visits, McNulty located the military tear gas shell casing (Exhibit Q1237) referenced earlier. McNulty already had the photograph of the missing military tear gas projectile which had been produced to the Davidians in the criminal trial, and recognized it as a pyrotechnic device. McNulty did not initially disclose his findings to the public but continued to seek additional information from the Department of Justice and other sources through correspondence.

144. On June 14, 1999, the Texas Department of Public Safety began an evidence review in the course of preparing a motion to transfer custody of the Waco evidence to the Court. The Ranger leadership assigned Sergeant Joey Gordon to conduct the review and instructed him to review carefully

evidence that the Rangers had made available to McNulty. While reviewing the evidence, Sgt. Gordon initiated an investigation of the 40 millimeter military tear gas round shell casing, Exhibit Q1237.

145. On July 28, 1999, *The Dallas Morning News* published an article reporting that the head of the Texas Department of Public Safety had stated that evidence held in the custody of the Rangers called into question the federal government's claim that its agents used no incendiary devices on April 19, 1993. A spokesman for the Department of Justice dismissed the allegation as "more nonsense." Attorney General Reno responded at her weekly news conference, as quoted by *The Dallas Morning News* in an article published July 30, 1999, that "I have gone over everything, and I know of no such evidence."

146. On August 19, 1999, while preparing for the civil trial, Department of Justice civil attorney James Touhey conducted a database search for the term "bubblehead" which he had seen in the Sherrow Declaration. He found the 1996 Hickey memorandum to Brown discussing the use of the pyrotechnic military tear gas rounds by the FBI at Waco, as well as Longoria's notes from the Corderman interview and the witness chart referring to the use of "military rounds" and "bubblehead." Touhey contacted Brown, but she said that she had no recollection of the Hickey memo. Touhey faxed a copy of the memorandum to Brown on August 19, 1999.

147. *The Dallas Morning News* continued to report on the release and surrender of custody of the Waco evidence. In response to a request for comments on the allegations regarding pyrotechnics, a

Department of Justice spokesman told *The Dallas Morning News* on August 23, 1999, that "[W]e are aware of no evidence to support the notion that any pyrotechnic devices were used by the federal government on April 19." *The Dallas Morning News* reported this statement on August 24, 1999, along with the news that former FBI Deputy Assistant Danny Coulson now confirmed that the FBI had fired pyrotechnic devices on April 19, 1993. On August 25, the FBI confirmed that it "may have used a very limited number of military-type CS gas canisters on the morning of April 19 . . . ." In the following days, the national media picked up the story and began to raise serious questions about whether the Department of Justice had been forthright with the American people concerning the conduct of the FBI on April 19, 1993. In addition, on August 27, 1999, *The Dallas Morning News* reported the presence of military Special Forces personnel at Waco, stating a source had indicated that members of a secret Army unit were "present, up front and close" during the FBI operation of April 19, 1993.

148. On August 30, 1999, Johnston wrote Attorney General Reno, stating that he had been unfairly chastised for letting McNulty view the physical evidence in the possession of the Texas Rangers and suggesting that Attorney General Reno had been misled about the FBI's use of pyrotechnic devices on April 19, 1993.

149. In early September 1999, the FBI disclosed publicly the existence of additional FLIR video recordings which it had previously claimed did not exist, one of which contained the audio recording of the request and authorization of the HRT to fire the military tear gas rounds. On September 2 and 3, 1999, the FBI press office released the morning FLIR recordings, including the audio, which confirmed

the firing of the pyrotechnic military tear gas rounds at the concrete construction pit shortly after 8:00 a.m. on April 19, 1993.

150. As a result of the public release of information from the newly discovered FLIR tapes, the public disclosure of the military tear gas shell and the photograph of the military projectile, and the new information about the presence of Army Special Forces personnel at Waco, on September 1, 1999, at the suggestion of FBI Director Louis Freeh, Attorney General Reno sent U.S. Marshals to the FBI to confiscate Waco-related evidence. Then, after first considering allowing the FBI to investigate the matter, she decided to appoint a Special Counsel to investigate questions about the conduct of the FBI at Waco, and whether any government official had covered up information about the incident. On September 9, 1999, Attorney General Reno appointed former United States Senator John C. Danforth as Special Counsel, issued Order No. 2256-99 defining his charter, and recused herself from further involvement in the Waco matter.

* * * * * * * * * * * * * * * * * * *

This concludes the Special Counsel's Interim Report to the Deputy Attorney General. The Office of Special Counsel intends to proceed with dispatch to conclude the open issues concerning the possible concealment of evidence and to issue its Final Report, if at all possible, by the end of this year.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

ISABEL G. ANDRADE, ET AL., Plaintiffs,	§	
v.	§	Civil No. W-98-CA-139 (Consolidated)
UNITED STATES OF AMERICA, Defendant.	§	

AMENDED
FINDINGS OF FACTS
AND
CONCLUSIONS OF LAW

The above-captioned cause of action came on for trial before the Court and an advisory jury on June 19 through July 14, 2000.

Before reaching the merits of the suit, the Court must address two motions recently filed by the Plaintiffs – a second motion to recuse and a motion for reconsideration. The attorneys for the Andrade plaintiffs request the undersigned recuse himself from further participation in this lawsuit because they contend there was bias against them and their clients. This motion is a further example of this attorney's abuse of the judicial process. As has been clear that for the past year, the attorneys representing the Andrade plaintiffs have attempted to try their case in the media through the use of innuendo, distortions, and outright falsehoods, rather than honestly presenting the true facts of the case. None of the allegations contained in

Plaintiffs' motion, either singularly or combined, forms a legal basis for recusal.

Although it should not be necessary, the Court reminds Mr. Caddell of a lawyer's responsibilities as set out in the Preamble to the Texas Disciplinary Rules of Professional Conduct:

> A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold the legal process.

Rule 8.02(a) further provides: "A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory official or public legal officer, or of a candidate for election or appointment to judicial or legal office." Many of the allegations contained in Plaintiffs' motion are either false or made with reckless disregard as to their truth or falsity.

As an example, Mr. Caddell asserts that the Court should recuse himself because the Government's attorneys presented gifts to the Court's staff. Having investigated, the Court has determined that as a prank played on a deputy marshal, some t-shirts were purchased by government attorneys and presented to deputy marshals. Deputy marshals are not part of the Court's staff. Neither the undersigned, nor his secretary, court reporter, or his law clerks (those persons who

constitute the Court's staff) received t-shirts, nor were even aware until now that the prank had occurred. Other "gifts" that Mr. Caddell may refer to involve the presentation of chocolate chip cookies to the clerk's office, baked by a representative of the government. Once again, the employees of the clerk's office are not members of the Court's staff, and neither the undersigned, his secretary nor law clerks received any cookies.

As a second example, Mr. Caddell complains of the Court's comments concerning Livingstone Fagan. That statement was off the record in response to another lawyer's humorous suggestion, and was not in any way intended to be taken seriously.

Additionally, there is absolutely no legal basis for Plaintiffs' motion, but is merely another attempt to unnecessarily complicate this litigation. Accordingly, the Andrade Plaintiffs' Second Motion to Recuse is DENIED.

The Brown and Holub Plaintiffs seek reconsideration of this Court's decision to proceed to rule on the FLIR issue without an additional hearing. This decision was made as the Plaintiffs had no desire to go to London to depose the Court's expert or to appear before this Court to cross-examine him. Despite Plaintiffs' assertions, they have been on notice since the Court's Order of June 13, 2000 that the Court would resolve this issue on the pleadings and summary judgment proof that had already been filed and on the report from Vector Data Systems. The parties have had more than sufficient time since that date to present additional evidence or

argument regarding the FLIR issue. The failure to present such evidence is the fault of the parties in attempting to circumvent the clear intention of the Court that Mr. Oxlee's deposition occur in England rather than in the United States. Had the parties adhered to the Court's Order, Mr. Oxlee's deposition could have been taken and presented to the Court by this time.

The Court understands the financial straits that the Plaintiffs and their attorneys may face, but that is no more than is faced by any plaintiff in any civil suit. The fact that a party cannot afford to hire a particular expert or take as many depositions as they wish is merely a product of our legal system – there is no requirement that a defendant or the Court be forced to absorb such expenses merely because a plaintiff may wish it. In no other case has the Court required a defendant to defray as many pre-trial costs as in this one. There will be no further delay for the Plaintiffs to present any additional FLIR evidence.

The Brown and Holub Plaintiffs additionally object to being required to pay their proportionate share of the FLIR test that was conducted at Ft. Hood. The amount attributable to these Plaintiffs is a mere drop in the bucket to the total costs that were expended to hold the test and to transport the Lynx helicopter from Great Britain. There was no objection from any party at the time the protocol was finalized in St. Louis, even though all parties were represented; nor was there any objection made to the Court's Order mandating the FLIR test which clearly provided that the costs of the tests would be assessed among the parties as the Court deemed

appropriate. Accordingly, the Motion of the Brown and Holub Plaintiffs for Reconsideration of the Court's Order of August 29, 2000 is **DENIED**.

The Andrade Plaintiffs' latest attempt to delay this case is their Motion to Reopen the evidence. As with their Motion to Recuse, there is no basis for their request. Plaintiffs argue that they were prepared to present evidence regarding the Government's misconduct during the 51-day siege but did not because of the Government's stipulation that it would not seek an issue regarding contributory negligence. However, that evidence would not have been admissible regardless of the Government's stipulation. Plaintiffs obviously did not read the Court's previous Order partially granting the Government's and individual Defendants' Motions to Dismiss and/or for Summary Judgment which determined that there could be no liability for the Government's actions during the 51-day siege because those actions were covered by the discretionary function exception to the Federal Tort Claims Act. Additionally, the charge given to the jury was absolutely correct -- Plaintiffs were under an obligation to submit to lawful authority and were in violation of the law for their failure to do so. Finally, the Plaintiffs' actions during that time preclude them from claiming negligence on the part of the Government as their own actions were the sole proximate cause of any injuries during that period. The law requires each person to act reasonably; the standard is what a reasonable person would do, not what a reasonable Davidian would do. As a matter of law, there was nothing reasonable about the adult Davidians' behavior from February 28, 1993 through April

19, 1993. Accordingly, Plaintiffs' Motion to Reopen is DENIED.

The next issue the Court must address is the Plaintiffs' allegation that FBI agents fired into the Compound on April 19, 1993 to prevent the Davidians from exiting. As the Court previously noted, there is sufficient summary judgment proof contained in the record in this case, along with the report from Vector Data Systems, to rule upon this issue without the necessity for a hearing, although the Court did provide the opportunity for the parties to address these issues in a hearing. The basis for Plaintiffs' argument in this regard is the presence of flashes or glints of light that could be seen on the FLIR tape taken on April 19. The Court has carefully considered all of the expert testimony filed by both sides, as well as that of VDS, and has determined that Plaintiffs have failed to establish that any of those "anomalies" are gunfire. This is bolstered by the following: (1) the glints are too long in light of the signature flashes of the fastest weapons possessed by the FBI on that day; and (2) there is no detectable human presence in the vicinity of the glints. Plaintiffs' experts offer mere speculation that FBI agents could have been there and might have been wearing clothing that would not have been detected by the FLIR. Mere speculation does not constitute proof, and there is no further proof in support of those claims. Accordingly, it is ORDERED that the Government is entitled to Judgment as a matter of law on the FLIR issue.

After considering the pleadings, evidence, arguments and briefs, the Court enters the following findings of fact and conclusions of law:

Findings of Fact

A. Background

The background of the Davidians and the ATF investigation is set forth in the Court's July 1, 1999 *Memorandum Opinion and Order* and is incorporated herein. Therefore, the Court will not revisit those issues.[1]

B. The Events of February 28, 1993

1. The Branch Davidians (Davidians) initiated a gun battle when they fired at federal officers who were attempting to serve lawful warrants.

2. The Davidians provoked gunfire when they barraged ATF agents with gunfire directed from multiple locations.

3. The gunfire came from all floors of the Mt. Carmel Compound (Compound).

4. No ATF agent fired any shot nor used any force against residents of the Compound and the Davidians that was unprovoked.

5. Gunfire was directed at ATF agents by both male and female adult Davidians.

6. No ATF agent fired any shot nor used any force against residents of the Compound and the Davidians that was indiscriminate.

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[1]The only factual issues that Plaintiffs have proven incorrect from the Court's Order were the presence of Army personnel at the scene and the use of pyrotechnic devices by the FBI. However, the Army personnel had no participation in any of the events that occurred on April 19, but acted merely as observers. Also, the pyrotechnic devices fired by the FBI did not penetrate the Compound and did not cause nor contribute to the fire.

7. ATF agents returned gunfire to the Compound in order to protect themselves and other agents from death or serious bodily injury.

8. At all times, the ATF agents' gunfire was directed at those areas of the Compound where they perceived deadly threats.

9. The ATF agents were prevented from serving the lawfully issued arrest and search warrants by the Davidians' superior fire power and defensive position.

C. The Events of April 19, 1993

1. A number of Davidians left the Compound after February 28 but before April 19, 1993.

When the FBI injected tear gas into the Compound on April 19, 1993, the remaining Davidians did not leave as instructed by the FBI. Instead certain Davidians directed gunfire at the CEV's and the Bradley vehicles.

2. The FBI acted with restraint on April 19, 1993, despite the deadly gunfire directed at them during the tear gas operation. The FBI did not return fire.

3. During the course of the day, certain Davidians prevented others from leaving the Compound. During the stand-off, Davidians had blocked the doors, windows, and other areas of the Compound, thereby inhibiting egress from these areas on April 19, 1993. At least twenty-one of the Plaintiffs died of wounds that apparently were either self-inflicted or inflicted by other Davidians; twenty Davidians died of gunshot wounds and one child died of a stab wound to the chest.

4. The FBI did not prevent nor hinder any Plaintiff from leaving the building.

To the contrary, the FBI repeatedly asked the Davidians to leave the building, warned them that tear gas would be inserted, opened up egress routes, and cleared material that was blocking the front door.

5. The Davidians possessed large-caliber weapons and had used these weapons to kill and injure the ATF agents. Military vehicles were utilized to provide protection to the officers on the scene.

6. FBI agents operating the military vehicles inserted tear gas in accordance with the approved Plan of Operations on April 19, 1993. Because the plan could not provide for every contingency, it necessarily afforded discretion to the FBI agents on the scene to adapt to the evolving conditions, including, among other things, the failure of the Davidians to leave the building, the relative ineffectiveness of the tear gas due to the wind and the Davidians' gas masks, and the possibility that certain individuals inside were prevented from leaving because the exits were barricaded. Any deviation from the written plan was within the authority delegated to the agents on the scene.

7. One of the military vehicles, CEV-1, penetrated the left-front area of the compound with its boom only to insert tear gas. CEV-1 did not cause any debris to fall on nor block the trap-door located some twelve feet from the front of the building.

8. Although the FBI fired three so-called "military" CS tear gas rounds at approximately 6:00 a.m. on April 19, 1993 at the structure the Plaintiffs call the tornado shelter, no such rounds were fired into the main wooden structure. No

Plaintiff was injured by the firing of these rounds, and they had no causal relationship to the fires which broke out shortly after noon.

9. Three separate fires started within two minutes of one another, beginning shortly after noon on April 19, 1993.

10. These fires were started intentionally by Davidians, including but not limited to, Plaintiffs David Koresh,[2] Clive Doyle, Pablo Cohen and Derek Lovelock.[3]

11. The adult Davidians kept the children in the Compound after starting the fire rather than sending them to safety.[4]

12. The fires were neither caused nor contributed to by any act of the Defendant.

13. In fact, several of the Davidians were rescued by FBI agents, who faced gunfire and flames to pull them to safety. Special Agents Bryan Timmis and Mark Tilton left the protection of their Bradley Vehicles to come to the aid of Plaintiff Marjorie Thomas, who was on fire when she left the building. Special Agent James McGee actually entered the building when it was engulfed in flames and carried Ruth Riddle to safety. Neither would tell the agents where the children were located, nor

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[2]The entire tragedy at Mount Carmel can be laid at the feet of this one individual.

[3]The most telling evidence in this regard is the conversations of the Davidians captured by the FBI on the hidden microphones. While there was much discussion of spreading the fuel and starting the fire, there was no discussion of getting the children to safety.

[4]In contrast, agents of the Defendant acted reasonably in their efforts to protect the children.

would Clive Doyle after he left the building.[5]

14. The FBI's plan to combat a fire at the Compound, should any develop, did not violate any mandatory directive from the United States Attorney General. The FBI's plan relied on the firefighting resources of the local community. In accordance with the FBI's plan, the local authorities were contacted shortly after the fire started.

15. Generally, in order to rescue fire victims, firefighters must enter the structure and fight the fire from the inside. However, because gunfire continued to be heard in the Compound even as the fire consumed the building, the fire trucks were held away from the Compound temporarily, and the firefighters were not permitted to enter. In addition to gunfire, explosions from propane tanks and grenades increased the potential danger to the fire fighters.

16. The United States Attorney General did not mandate that the FBI have armored fire trucks or other equipment available on scene. In fact, she was aware that civilian firefighters would not be permitted to approach the Compound while the Davidians were shooting.

17. There is no proof that armored fire fighting vehicles that were available would have been effective due to their limited water reservoirs, the lack of a water supply at the scene, and the extreme speed in which the Compound was engulfed

[5]The actions of these agents are the most telling evidence that the Government did not plan to intentionally harm the Davidians either by shooting them or by setting fire to the Compound. It is inconceivable that these agents were the only ones not part of the "conspiracy." Likewise, had the Government intended to burn the Davidians out, the FBI would have used a true incendiary device rather than the ferret rounds actually used.

in flames .

18. The only gunfire on April 19, 1993 was generated by certain Davidians inside the Compound. There was no gunfire from any employee of the United States that day. None of the surviving Davidians saw or heard gunfire from any FBI agents, members of the military, or any person other than the Davidians at Mt. Carmel on April 19, 1993. Certain of the events that morning were recorded by the FBI's airborne forward looking infrared (FLIR) camera. Although the FLIR tapes do not show any people outside the Compound before the fire, the system did record a number of flashes in the area around the compound during the late morning. These flashes are too long in duration to have been caused by gunfire.

19. The Andrade and Holub Plaintiffs have stipulated that the following weaponry and ammunition were found in the Compound following the April 19, 1993 fire:

Sixty one (61) AK-47 rifles;

Sixty-one (61) M-16 rifles;

Thirty-four (34) semi-automatic AR-15 rifles;

Three (3) Galil rifles;

Eleven (11) FN-FAL Belgian rifles;

Ten (10) Ruger Mini-14 semi-automatic rifles;

Five (5) M-14 rifles;

Two (2) .50 caliber rifles;

Two (2) SP-89 firearms;

Five (5) MAC-11/9 firearms;

Thirteen (13) shotguns

Six (6) .30 caliber carbines;

Over fifty (50) pistols and revolvers;

A British semi-automatic Sten gun;

Other assorted rifles;

Forty-eight (48) of the firearms found in the Compound had been modified to shoot in a fully automatic mode;

Barrels for AR-15 or M-16 rifles; one barrel for a M-60 machine gun; and four (4) barrels for other firearms;

A number of illegal silencers and several silencer components;

Hundreds of cartridge magazines and magazine springs for various firearms;

Hundreds of thousands of rounds of ammunition, some cooked off;

Several hundred rounds of spent ammunition;

A number of grenade rockets, rocket heads and a wide variety of gun parts;

One live hand grenade;

Hundreds of pieces of exploded pineapple-type hand grenade fragments;

Hundreds of pineapple-type hand grenade hulls and several baseball-type hand grenade hulls, and seven (7) flare launchers.

20. Any finding of fact which would more appropriately be a conclusion of law

is deemed so.

Conclusions of Law

1. Jurisdiction is vested in this Court by virtue of the Federal Tort Claims Act, 28 U.S.C. § 1346(b) and 2671, *et seq.* (FTCA). The FTCA is a limited waiver of sovereign immunity for claims sounding in tort.[5] Plaintiffs contend venue was proper in the Southern District of Texas, Houston Division, where Plaintiffs' claims were initially filed, but do not challenge venue at this point in the Waco Division of the Western District of Texas.

2. Under the FTCA, Texas law governs this case.

3. Under the FTCA, Texas negligence law governs this case.

4. As a matter of Texas law, the Government was negligent if one of its agents, a) failed to do what a person of ordinary prudence would have done under the same or similar circumstances; or b) did what a person of ordinary prudence would not have done under the same or similar circumstances.

5. As a matter of Texas law, the Government's agents must exercise that degree of care that an ordinary prudent person would have used under the same or similar circumstances.

6. As a matter of Texas law, although the duty owed to children by the Government's agents is generally the same as that owed to adults, the risk of injury

[5] Those Plaintiffs remaining in the lawsuit as of the filing of these Findings of Fact and Conclusions of Law have satisfactorily established that they have exhausted their administrative remedies under the FTCA.

to a child may be greater than that posed to an adult by the same condition or act. Therefore, the exercise of ordinary care toward a child may require different conduct than would be required toward an adult.

7. As a matter of Texas law, a child under five years of age cannot be negligent.

8. As a matter of Texas law, a child at least five years old and under fourteen years old was negligent only if that child, a) failed to do what an ordinary prudent child of the same age, experience, intelligence and capacity would have done under the same or similar circumstances; or b) did what such a child would not have done under the same or similar circumstances.

9. As a matter of Texas law, a child at least five years old and under fourteen years old must exercise only that degree of care that an ordinary prudent child of the same age, experience, intelligence and capacity would have used under the same or similar circumstances.

10. As a matter of Texas law, a person who is fourteen years old or older is negligent only if that person, a) failed to do what a person of ordinary prudence would have done under the same or similar circumstances; or b) did what a person of ordinary prudence would not have done under the same or similar circumstances.

11. As a matter of Texas law, a person who is fourteen years old or older must exercise that degree of care that an ordinary prudent person would have used under the same or similar circumstances.

12. As a matter of Texas law, the negligence of a parent will not be imputed to a child with respect to a cause of action by the child's estate for survivor damages.

13. As a matter of Texas law, only the negligence of a parent that was a proximate cause of the death of the child will be considered in allocating responsibility with respect to the parent's wrongful death cause of action.

14. As a matter of Texas law, proximate cause means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event, but if an act or omission of any person other than the defendant or the particular claimant (deceased or injured party) was the "sole proximate cause" of an event, then no act or omission of any other person could have been a proximate cause.

A. The Events of February 28, 1993

1. It is the law of the case that the United States cannot be held liable for any claims based upon the decision to use a "dynamic raid and entry" to serve the warrants because these claims are barred by the discretionary function exception to the waiver of sovereign immunity. Likewise is the decision not to attempt to arrest David Koresh away from the Compound.

2. Moreover, ATF's decision to use a "dynamic raid and entry" to serve the

warrants was reasonable under the circumstances in light of the accumulation of weapons by the Davidians.

3. The ATF agents complied with the law, including identifying themselves and their purpose at the outset, in attempting to execute the arrest and search warrants at the Compound.

4. Because ATF agents did not fire without provocation or in an indiscriminate manner, the use of force by ATF agents was reasonable under the circumstances and cannot result in liability.

5. A law enforcement officer is privileged to engage in certain conduct which could normally be considered tortuous because the officer "has acted to further an interest of such social importance that it is entitled to protection, even at the expense of damage to the Plaintiff. The Defendant is allowed freedom of action because his own interest, or those of the public, required it, and because social policy will best be served by permitting it. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1231 (5th Cir. 1988) (quoting W. Keeton, Prosser and Keeton on Torts, 16 (5th edition 1984)). As stated in *Hinojosa*, a police officer in Texas is also privileged even to use force when necessary in the performance of his duties as an officer. *Id.*, citing the Texas Penal Code Annotated, §§ 9.21-9.22, 9.51, 9.52. Further, an officer in the state of Texas has an affirmative duty to execute all lawful process issued to him by any Magistrate or Court. Texas Code of Criminal Procedure, Annotated, Article 2.13.

B. The Events of April 19, 1993

1. It is the law of the case that the United States cannot be held liable for any claims based upon the decision to use tear gas in the April 19, 1993 attempt to end the stand-off because these claims are barred by the discretionary function exception.

2. Likewise, the decision to use tanks to insert the tear gas is protected by the discretionary function exception. The FBI had discretion as to the type of vehicles and equipment to use in attempting to achieve the goals of the operation which were grounded in law enforcement policy. Given that the discretion to use tear gas is protected, the decision as to the type of vehicles and equipment to use in insertion is necessarily protected as well. *See United States v, Faneca*, 332 F.2d 872, 874-75 (5th Cir. 1964), *cert. denied*, 380 U.S. 971 (1965) (barring claims based on the decision to use tear gas, the "*modus operandi* and the time to put it into action").

3. Therefore, Plaintiffs' claim alleging that the FBI was negligent in proceeding with the tear gas operation in light of the information available regarding the condition of the building, the habits of the Davidians, and the weather is also barred by the discretionary nature of the conduct at issue. The exception covers negligence and abuse of discretion, as well as the failure to consider possible alternatives. *Myslakowski v. United States*, 806 F.2d 94, 97-98 (6th Cir. 1986), *cert, denied*, 480 U.S. 948 (1987)("Indeed, it is, in part, to provide immunity against

liability for the consequences of negligent failure to consider the relevant, even critical matters in discretionary decision-making that [§ 2680(a)] exists.") Thus, even assuming that the decision to proceed with the operation failed to consider the possibility that the Davidians might start a fire–and thus "could be shown to have been made without consideration of important, relevant factors, or was a decision negligently reached," *id.*–the discretionary function exception bars the claim. *See Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187 (D.C. Cir.1987) (barring claims based on failure to assess information received and to have alternative plan in place).

4. Similarly, Plaintiffs' claim that the use of military tanks to insert tear gas caused the Davidians to refuse to surrender and to set the building on fire, killing their children and themselves, is barred because this claim is "based upon" and arises out of conduct that is encompassed by the discretionary function exception. *See* 28 U.S.C. § 2680(a) (barring any claim "based upon" the exercise or performance of a discretionary function); *Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279 (3rd Cir.) (en banc), *cert. denied*, *Balmaceda, Inc. v. United States*, 116 S.Ct. 49 (1995) (barring claim deemed "based upon" discretionary decision to suspend importation of fruit, notwithstanding plaintiffs' contention that claim is predicated on negligent chemical analysis underlying the decision).

5. Further, the Court finds as a matter of law that the use of tear gas, an

accepted law enforcement practice, was reasonable under the circumstances, given the refusal of the Davidians to comply with lawful orders to surrender. Texas has accorded privileges to its law enforcement officers in the performance of their duties as officers. *Hinojosa v. City of Terrell, Texas*, 834 F.2d 1223, 1231 (5th Cir. 1988), *cert. denied*, 493 U.S. 822 (1989) (privilege protects actor from finding of tortuous conduct). Under the FTCA, the United States may invoke privileges available to state law enforcement officials. *Id.* *See also, Louie v. United States*, 776 F.2d 819, 824-25 (9th Cir. 1985). The use of tanks to insert tear gas to end the 51-day stand-off between federal officers and armed resisters was privileged under Texas law which allows officers to use that force necessary to make or assist in making an arrest or search. *See* Texas Penal Code § 9.51.

6. Moreover, even if the United States was negligent in causing damage to the building prior to the start of the fire, such negligence was not the proximate cause of the Plaintiffs' injuries. The intervening criminal acts of certain Davidians in starting the fire was a superceding cause that was different in kind from that which would otherwise have resulted from such negligence. It therefore broke any purported causal connection between the damage to the building and the Plaintiffs' injuries. *See Skipper v. United States*, 1 F.3d 349, 353 (5th Cir. 1993) (murder committed by intoxicated boyfriend was superceding cause which extinguished any liability on the part of club that served alcohol to him because premeditated murder was not "of

such a general character as might reasonably have been anticipated" by the club); *Phan Son Van v. Pena*, 990 S.W.2d 751 (Tex. 1999) (gang members' criminal conduct and harm inflicted was extraordinary in nature and not of the type generally contemplated by unlawfully furnishing alcoholic beverages to minors and thus was superceding cause of injuries and death).

7. Because the fire was started by certain Davidians, the United States owed no duty to protect the remaining Davidians from the fire and no special relationship existed between the Plaintiffs and the United States which would invoke such a duty. *See Crider v. United States*, 885 F.2d 294, 299 (5th Cir. 1989), *cert. denied*, 495 U.S. 956 (1990) ("it presses the potential liability of law enforcement officers-or of any group-to the extreme to suggest that just because having a contact with a potentially dangerous actor they become responsible for his conduct"). Despite this, a number of FBI agents risked their lives to assist Davidians from the burning Compound and to attempt to save the children.

8. Because the fire was started by certain Davidians, the United States owed no duty to rescue the remaining Davidians from a peril it did not cause. *See Ohler v. Trinity Portland Cement Co.*, 181 S.W.2d 120, 127 (Tex. Civ. App.-Galveston 1944).

9. The FBI's decision not to allow the fire trucks upon the property was reasonable. The on-scene commander would not allow the fire trucks to approach the Compound given the risk of injury or death posed to firefighters by the gunshots

coming from the Compound. His decision not to allow the fire trucks to approach the Compound until it was safe for them to do so was reasonable under the circumstances and therefore cannot result in liability.

10. Plaintiffs' related claim based on the failure to have specialized equipment that may have enabled firefighters to approach the compound sooner despite the gunfire is barred by the discretionary function exception. The decisions as to the type of equipment to be utilized fall within the exception because they are "susceptible to policy analysis." *United States v. Gibbered,* 499 U.S. 315, 325 (1991). *See Brown v. United States*, 790 F.2d 199, 203 (1st Cir. 1986), *cert. denied*, 479 U.S. 1058 (1987) (barring claim that death of fisherman was caused by failure to obtain more or better equipment because "[all of these are matters which Congress reserved, both to itself in respect to appropriations, and to the agencies' conduct by the discretionary function exception").

11. Any conclusions of law which should more appropriately be a finding of fact is deemed so.

SIGNED this 27 day of September, 2000.

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

EXHIBIT 4

UNSUBSTANTIATED ALLEGATIONS OF WRONGDOING INVOLVING THE CLINTON ADMINISTRATION

Prepared for Rep. Henry A. Waxman

Minority Staff Report
Committee on Government Reform
U.S. House of Representatives

September 2000

Over the past eight years, Chairman Dan Burton of the House Government Reform Committee and other Republican leaders have repeatedly made sensational allegations of wrongdoing by the Clinton Administration. In pursuing such allegations, Chairman Burton alone has issued over 900 subpoenas; obtained over 2 million pages of documents; and interviewed, deposed, or called to testify over 350 witnesses. The estimated cost to the taxpayer of investigating these allegations has exceeded $23 million.[1]

Chairman Burton or other Republicans have suggested that Deputy White House Counsel Vince Foster was murdered as part of a coverup of the Whitewater land deal; that the White House intentionally maintained an "enemies list" of sensitive FBI files; that the IRS targeted the President's enemies for tax audits; that the White House may have been involved in "selling or giving information to the Chinese in exchange for political contributions"; that the White House altered videotapes of White House coffees to conceal wrongdoing; that the Clinton Administration sold burial plots in Arlington National Cemetery; that prison tape recordings showed that former Associate Attorney General Webster Hubbell was paid off for his silence; and that the Attorney General intentionally misled Congress about Waco.

This report is not intended to suggest that President Clinton or his Administration have always acted properly. There have obviously been instances of mistakes and misconduct that deserve investigation. But frequently the Republican approach -- regardless of the facts -- has been "accuse first, investigate later." Further investigation then often shows the allegations to be unsubstantiated. In fact, FBI interviews showed that one widely publicized Republican allegation was based on nothing more than gossip at a congressional reception.

This approach has done great harm to reputations. The unsubstantiated accusations have frequently received widespread attention. For example, Chairman Burton's allegation regarding White House videotape alteration received widespread media coverage. It was reported by numerous television news programs, including *CBS Morning News,*[2] *CBS This Morning,*[3] *NBC News At Sunrise,*[4] NBC's *Today,*[5] *ABC World News Sunday,*[6] *CNN Early Prime,*[7] *CNN Morning News,*[8] CNN's *Headline News,*[9] CNN's *Early Edition,*[10] Fox's *Morning News,*[11] and *Fox News Now/Fox In Depth.*[12] In addition, newspapers across the country, including the *Washington Post,*[13] the *Las Vegas Review-Journal,*[14] the *Houston Chronicle,*[15] the *Commercial Appeal,*[16] and the *Sun-Sentinel,*[17] published stories focusing on the allegation. Two months later, when Senator Fred Thompson announced that there was no evidence that the videotapes had been doctored, there was minimal press coverage of his statement.[18]

The discussion below examines the facts – and lack thereof – underlying 25 of the most highly publicized allegations.

Allegation: During 1994 and 1995, Chairman Burton suggested numerous times on the House floor that Deputy White House Counsel Vince Foster had been murdered and that his murder was related to the investigation into President and Hillary Clinton's involvement in the Whitewater land deal.[19]

The Facts: Chairman Burton's allegations have been repeatedly repudiated.

On August 10, 1993, the United States Park Police announced the following conclusions of its investigation: "Our investigation has found no evidence of foul play. The information gathered from associates, relatives and friends provide us with enough evidence to conclude that . . . Mr. Foster was anxious about his work and he was distressed to the degree that he took his own life."[20] On June 30, 1994, Independent Counsel Robert Fiske issued his report stating that "[t]he overwhelming weight of the evidence compels the conclusion . . . that Vincent Foster committed suicide."[21]

More recently, on October 10, 1997, Independent Counsel Ken Starr concluded: "The available evidence points clearly to suicide as the manner of death."[22]

Allegation: In 1995 and 1996, Republicans alleged that the White House fired the employees of the White House travel office so that White House travel business would be given to Harry Thomason, a political supporter of President Clinton. The Chairman of the House Committee on Government Reform and Oversight, William F. Clinger, said he saw the First Lady's "fingerprints" on efforts to cover up and lie about the travel office firings.[23] Discussing the travel office matter, Rep. Dan Burton said, "The First Lady, according to the notes we have, has lied."[24]

The Facts: In June 2000, the Office of the Independent Counsel issued a press release announcing that its investigation into the Travel Office matter had concluded. Independent Counsel Robert Ray stated:

> This Office has now concluded its investigation into allegations relating to . . . Mrs. Clinton's statements and testimony concerning the Travel Office firings and has fully discharged [her] from criminal liability for matters within this Office's jurisdiction in the Travel Office matter.[25]

Allegation: In June 1996, Chairman Burton alleged that the White House had improperly obtained FBI files of prominent Republicans and that these files "were going to be used for dirty political tricks in the future."[26] Committee Republicans also released a report suggesting that the files were being used by the Clinton Administration to compile a "hit list" or an "enemies list."[27]

The Facts: These allegations have been thoroughly investigated by the Office of the Independent Counsel and repudiated. The Independent Counsel had been charged with examining whether Anthony Marceca, a former White House detailee who had requested the FBI background files at issue, senior White House officials, or Mrs. Clinton had engaged in illegal conduct relating to these files.

According to the report issued by Independent Counsel Ray in March 2000, "neither Anthony Marceca nor any senior White House official, or First Lady Hillary Rodham Clinton, engaged in

criminal conduct to obtain through fraudulent means derogatory information about former White House staff." The Independent Counsel also concluded that "Mr. Marceca's alleged criminal conduct did not reflect a conspiracy within the White House," and stated Mr. Marceca was truthful when he testified that "[n]o senior White House official, or Mrs. Clinton, was involved in requesting FBI background reports for improper partisan advantage."[28]

Allegation: Beginning in 1996, Chairman Burton and other Republican leaders suggested that there was a conspiracy between the Chinese government and the Clinton Administration to violate federal campaign finance laws and improperly influence the outcome of the 1996 presidential election. In a February 1997 interview on national television, Chairman Burton stated:

> **If the White House or anybody connected with the White House was selling or giving information to the Chinese in exchange for political contributions, then we have to look into it because that's a felony, and you're selling this country's security – economic security or whatever to a communist power.[29]**

Further, on the House floor in June 1997, Chairman Burton alleged a "massive" Chinese conspiracy:

> **We are investigating a possible massive scheme . . . of funneling millions of dollars of foreign money into the U.S. electoral system. We are investigating allegations that the Chinese government at the highest levels decided to infiltrate our political system.[30]**

The Facts: The House Government Reform Committee to date has spent four years and over $8 million investigating these allegations. No evidence provided to the Committee substantiates the claim that the Administration was "selling or giving information to the Chinese in exchange for political contributions."

The FBI obtained some evidence that China had a plan to try to influence congressional elections.[31] However, no evidence was provided to the Committee that the Chinese government carried out a "massive scheme" to influence the election of President Clinton.

Allegation: In June 1997, Rep. Gerald Solomon, the Chairman of the House Rules Committee, claimed that he had "evidence" from a government source that John Huang, the former Commerce Department official and Democratic National Committee fundraiser, had "committed economic espionage and breached our national security." This allegation was reported on national television and in many newspapers across the country.[32]

The Facts: In August 1997, and again in February 1998, Rep. Solomon was interviewed by the FBI to determine the basis of Rep. Solomon's allegations. During the first interview, Rep. Solomon told the FBI that he was told by a Senate staffer at a Capitol Hill reception that the staffer "received confirmation that 'a Department of Commerce employee had passed classified

information to a foreign government.'" According to the FBI notes on the Solomon interview, the Senate staffer did not say that the employee was John Huang, nor did he say that information went to China. Rep. Solomon did not know who the staffer was.[33]

In his second interview with the FBI, Rep. Solomon recalled that what the staffer said to him was: "Congressman you might like to know that you were right there was someone at Commerce giving out information." Again in this interview, Rep. Solomon told the FBI that he did not know the name of the staffer who made this comment.[34]

Allegation: In August 1997, several Republican leaders called for an independent counsel to investigate allegations by Democratic donor Johnny Chung that former Energy Secretary Hazel O'Leary had, in effect, "shaken down" Mr. Chung by requiring him to make a donation to the charity Africare as a precondition to a meeting with her. On national television, Republican National Committee Chairman Jim Nicholson stated, "[W]e need independent investigation made of people like Hazel O'Leary."[35] Rep. Gerald Solomon, the Chairman of the House Rules Committee, criticized the Attorney General for being "intransigent" in refusing to appoint an independent counsel.[36]

The Facts: A Department of Justice investigation found "no evidence that Mrs. O'Leary had anything to do with the solicitation of the charitable donation."[37] In fact, it turned out that Secretary O'Leary's first contact with Mr. Chung occurred after Mr. Chung had made his contribution, making the allegation factually impossible.[38]

Allegation: In September 1997, Chairman Burton suggested on national television that the Clinton Administration was engaging in an "abuse of power" by using the Internal Revenue Service (IRS) to retaliate against the President's political enemies.[39] *The Washington Times* also quoted the Chairman as stating: "One case might be a coincidence. Two cases might be a coincidence. But what are the chances of this entire litany of people -- all of whom have an adversarial relationship with the President -- being audited?"[40]

The Facts: The Chairman's remarks related to allegations that the IRS was auditing conservative groups and individuals for political purposes. According to these allegations, several non-profit tax-exempt organizations that supported positions different from those of the Clinton Administration were being audited while other organizations favored by the Administration were not.[41]

The Joint Committee on Taxation conducted a three-year bipartisan investigation of these allegations. In March 2000, the Committee reported that it had found no evidence of politically motivated IRS audits.[42] Specifically, the bipartisan report found there was "no credible evidence that tax-exempt organizations were selected for examination, or that the IRS altered the manner in which examinations of tax-exempt organizations were conducted, based on the views espoused by the organizations or individuals related to the organization." Further, the report found "no credible evidence of intervention by Clinton Administration officials (including

Treasury Department and White House officials) in the selection of (or the failure to select) tax-exempt organizations for examination."[43]

Allegation: In October 1997, Chairman Burton held a hearing which he claimed would produce evidence of "blatantly illegal activity by a senior national party official."[44] The star witness at that hearing, David Wang, alleged that then-DNC official John Huang had solicited a conduit contribution from him in person in Los Angeles on August 16, 1996.[45]

The Facts: It was Charlie Trie and his associate Antonio Pan, not John Huang, who solicited Mr. Wang. Unlike Mr. Huang, Mr. Trie and Mr. Pan were never "senior officials" at the DNC. Credit card records, affidavits, and other evidence conclusively demonstrated that Mr. Huang had been in New York, not Los Angeles, on the day in question.[46] Mr. Huang later testified before the Committee and denied Mr. Wang's allegations.[47] On March 1, 2000, Democratic fundraiser Charlie Trie appeared before the Committee and acknowledged that it had been he and Mr. Pan, not Mr. Huang, who had solicited the conduit contribution.[48]

Allegation: At an October 1997 hearing before the House Committee on Government Reform and Oversight, Chairman Burton publicly released a proffer from Democratic fundraisers Gene and Nora Lum. Chairman Burton stated that the proffer indicated that "the solicitation and utilization of foreign money and conduit payments did not begin after the Republicans won control of the Congress in 1994. Rather, it appears that the seeds of today's scandals may have been planted as early as 1991."[49] Specifically, the proffer suggested that President Clinton endorsed the candidacy of a foreign leader in exchange for campaign contributions.[50] This allegation was reported in the *Washington Post* in an article entitled "Story of a Foreign Donor's Deal With '92 Clinton Camp Outlined," and in other national media.[51]

The Facts: To investigate this allegation and other allegations concerning the Lums, Chairman Burton issued nearly 200 information requests that resulted in the receipt of over 40,000 pages of documents, 50 audiotapes, a videotape, and numerous depositions. After this extensive investigation, however, the Chairman was never able to produce any evidence to support the dramatic allegation in the proffer.

The proffer presented by Chairman Burton states that, during the 1992 campaign, the Lums arranged a meeting with a Clinton/Gore official for an individual who had proposed to arrange a "large donation in exchange for a letter signed by the Clinton campaign endorsing the candidacy of a man who is now the leader of an Asian nation." The proffer states that the official "later provided a favorable letter over the name of Clinton," that a "Clinton/Gore official signed then Governor Clinton's name to the letter," and that the individual who made the request for the letter then made a $50,000 contribution that reportedly came from "a foreign person then residing in the United States."[52]

In its investigation, the only letter the Committee obtained that concerned then-Governor Clinton's position on an election in Asia is an October 28, 1992, letter on Clinton/Gore letterhead

that pertains to the presidential election in Korea. This document specifically states that then-Governor Clinton does not believe it is appropriate for U.S. public officials to endorse the candidacies in foreign elections. The letter states:

> Thank you for bringing to my attention the impact in Korea that my statement of September 17th has caused. I would appreciate your help in clarifying the situation in Korea through proper channels. My statement was a courtesy reply in response to an invitation to me to attend an event in honor of Chairman Kim Dae-Jung, and to extend to him my greetings. It was not meant to endorse or assist his candidacy in the upcoming presidential election in Korea. I do not believe that any United States government official should endorse a presidential candidate in another country.[53]

Allegation: On October 19, 1997, Chairman Burton appeared on national television and suggested that the White House had deliberately altered videotapes of presidential fund-raising events. On CBS's *Face the Nation*, he said "We think ma--maybe some of those tapes may have been cut off intentionally, they've been--been, you know, altered in some way." He also said that he might hire lip-readers to examine the tapes to figure out what was being said on the tapes.[54]

The Facts: Investigations by the House Government Reform and Oversight Committee and the Senate Governmental Affairs Committee produced no evidence of any tampering with the tapes. Shortly after Chairman Burton made his allegation regarding tape alteration, the Senate Governmental Affairs Committee hired a technical expert, Paul Ginsburg, to analyze the videotapes to determine whether they had been doctored. Mr. Ginsburg concluded that there was no evidence of tampering.[55] In addition, Colonel Joseph Simmons, commander of the White House Communications Agency (WHCA), Colonel Alan Sullivan, head of the White House Military Office which oversees WHCA, and Steven Smith, chief of operations of WHCA, all testified under oath before the House Government Reform and Oversight Committee in October 1997 that they were unaware of any alteration of the videotapes.[56]

Allegation: In November 1997, Republican leaders drew on unsubstantiated reports by conservative radio talk shows and publications to accuse the Clinton Administration of selling burial plots in Arlington National Cemetery for campaign contributions.[57] Republican Party Chairman Jim Nicholson accused the Administration of a "despicable political scheme," and several Republican leaders, including Chairman Burton, called for investigations.[58] Representative Gerald Solomon stated, "[t]his latest outrage is one more slap in the face of every American who ever wore the uniform of their country, who seem to be special objects of contempt in this administration."[59]

The Facts: The Army has established restrictive eligibility requirements for burial at Arlington. Individuals who are eligible for Arlington National Cemetery burial sites include service members who died while on active duty, honorably discharged members of the armed forces who have been awarded certain high military distinctions, and surviving spouses of individuals

already buried at Arlington, among others. The Secretary of the Army may grant waivers of these requirements.[60]

In January 1998, the General Accounting Office (GAO) concluded an independent investigation of the allegations that waivers were granted in exchange for political contributions. As part of this investigation, GAO analyzed the laws and regulations concerning burials at Arlington, conducted in-depth review of Department of Army case files regarding approved and denied waivers, and had discussions with officials responsible for waiver decisions.[61]

GAO's report stated: "[W]e found no evidence in the records we reviewed to support recent media reports that political contributions have played a role in waiver decisions." Further, GAO stated: "Where the records show some involvement or interest in a particular case on the part of the President, executive branch officials, or Members of Congress or their staffs, the documents indicate only such factors as a desire to help a constituent or a conviction that the merits of the person being considered warranted a waiver."[62]

Allegation: In January 1998, Chairman Burton held four days of hearings into whether campaign contributions influenced the actions of Secretary of the Interior Bruce Babbitt or other Department of the Interior officials with respect to a decision to deny an Indian gambling application in Hudson, Wisconsin. During those hearings, Chairman Burton alleged that the decision was a "political payoff" and that it "stinks" and "smells."[63]

The Facts: On August 22, 2000, Independent Counsel Carol Elder Bruce released the report of her investigation into the Hudson casino decision. She found that the allegations of political payoff were unsubstantiated, concluding:

> A full review of the evidence . . . indicates that neither Babbitt nor any government official at Interior or the White House entered into any sort of specific and corrupt agreement to influence the outcome of the Hudson casino application in return for campaign contributions to the DNC.[64]

Allegation: In April 1998, Chairman Burton suggested that President Clinton had created a national monument in Utah in order to benefit the Lippo Group, an Indonesian conglomerate with coal interests in Indonesia.[65] James Riady, an executive of the Lippo Group, was a contributor to the DNC. In June 1998, in a statement on the House floor, Chairman Burton reiterated his allegation: "[T]he President made the Utah Monument a national park. What is the significance of that? The largest clean-burning coal facility in the United States, billions and billions of dollars of clean-burning coal are in the Utah Monument. It could have been mined environmentally safely according to U.S. engineers. Who would benefit from turning that into a national park so you cannot mine there? The Riady group, the Lippo Group, and Indonesia has the largest clean-burning coal facility, mining facility, in southeast Asia. They were one of the largest contributors. Their hands are all over, all over these contributions coming in from Communist China, from Macao and from Indonesia. Could there be a connection here?"[66]

The Facts: In September 1996, President Clinton set aside as a national monument 1.7 million acres of coal-rich land in Utah under a 1906 law that allows the president to designate national monuments without congressional approval.[67] After two years of investigation, the Committee produced no evidence that there is any connection between the designation of this land as a monument and Riady group or any other contributions.[68]

Allegation: In April 1998, Chairman Burton released transcripts of selected portions of Webster Hubbell's prison telephone conversations. According to these transcripts, if Mr. Hubbell had filed a lawsuit against his former law firm, it would have "opened up" the First Lady to allegations, and for this reason Mr. Hubbell had decided to "roll over" to protect the First Lady. These transcripts included a quote of Mrs. Hubbell saying, "And that you are opening Hillary up to all of this," and Mr. Hubbell responding, "I will not raise those allegations that might open it up to Hillary" and "So, I need to roll over one more time." These quotes were taken from a two-hour March 25, 1996, conversation between the Hubbells.[69]

The Facts: Webster Hubbell was Assistant Attorney General until March 1994. Prior to that, he was a partner with Hillary Clinton at the Rose Law Firm in Little Rock, Arkansas. In December 1994, Mr. Hubbell pled guilty to tax evasion and mail fraud and went to prison for 16 months.

During his imprisonment, Mr. Hubbell's phone calls to his friends, family, and lawyers were routinely taped by prison authorities. Such taping is standard in federal prisons. These tapes were turned over to the Government Reform and Oversight Committee. Although the tapes are supposed to be protected by the Privacy Act, Chairman Burton released a document in April 1998 entitled the "Hubbell Master Tape Log," which contained what were purported to be excerpts from these tapes. However, it was subsequently revealed that many of these excerpts were in fact inaccurate or omitted exculpatory statements made by Mr. Hubbell that directly contradicted the allegations.[70]

For example, while the "Hubbell Master Tape Log" quoted the above portions of the March 25, 1996, conversation between Mr. and Mrs. Hubbell, it omitted a later portion of the same conversation that appears to exonerate the First Lady. The later portion of that conversation follows, with the portions that Chairman Burton omitted from the "Hubbell Master Tape Log" underlined:

Mr. Hubbell: Now, Suzy, I say this with love for my friend Bill Kennedy, and I do love him, he's been a good friend, he's one of the most vulnerable people in my counterclaim. Ok?

Mrs. Hubbell: I know.

Mr. Hubbell: Ok, Hillary's not, Hillary isn't, the only thing is people say why didn't she know what was going on. And I wish she never paid any attention to what was going on in the firm. That's the gospel truth. She just had no idea

what was going on. She didn't participate in any of this.

Mrs. Hubbell: They wouldn't have let her if she tried.

Mr. Hubbell: Of course not.

The "Hubbell Master Tape Log" released by the Chairman also included an underlined passage in which Mr. Hubbell allegedly said: "The Riady is just not easy to do business with me while I'm here." In fact, the actual tape states: "The reality is it's just not easy to do business with me while I'm here."

Allegation: In April 1998, Chairman Burton sought immunity from the Committee for four witnesses: Nancy Lee, Irene Wu, Larry Wong, and Kent La. He and other Republicans leaders, including Speaker Newt Gingrich, alleged that these witnesses had important information about illegal contributions from the Chinese government during the 1996 elections.[71]

Speaker Gingrich alleged that the four witnesses would provide information on "a threat to the fabric of our political system."[72] Rep. John Boehner alleged that the witnesses had "direct knowledge about how the Chinese government made illegal campaign contributions" and stated that the decision regarding granting immunity "is about determining whether American lives have been put at risk."[73] Committee Republican Rep. Shadegg stated that one of the witnesses, Larry Wong, "is believed to have relevant information regarding the conduit for contributions made by the Lums and others in the 1992 fund-raising by John Huang and James Riady."[74]

The Facts: In June 1998, the Committee provided these witnesses with immunity. After they were immunized, their testimony revealed that none had any knowledge whatsoever about alleged Chinese efforts to influence American elections. For example, Mr. Wong's primary responsibilities in working for Democratic donor Nora Lum were to register voters and serve as a volunteer cook.[75] Following is the total testimony he provided regarding James Riady:

Majority Counsel: Did Nora ever discuss meeting James Riady?
Mr. Wong: James who?
* * *
Majority Counsel: James Riady.
Mr. Wong: No.[76]

Allegation: In May 1998, Rep. Curt Weldon suggested on the House floor that the President could have committed treason. Rep. Weldon's remarks involved allegations that the political contributions of the Chief Executive Officer of Loral Corporation, Bernard Schwartz, had influenced the President's decision to authorize the transfer of certain technology to China. Rep. Weldon described this issue as a "scandal that is unfolding that I think will dwarf every scandal that we have seen talked about on this floor in the past 6

years," and said, "this scandal involves potential treason."[77] The *National Journal* reported this allegation in an article that referred to Rep. Weldon as "a respected senior member of the National Security Committee."[78]

The Facts: The Department of Justice examined the allegations relating to whether campaign contributions influenced export control decisions and found them to be unfounded.[79] In August 1998, Lee Radek, chief of the Department's public integrity section, wrote that "there is not a scintilla of evidence – or information – that the President was corruptly influenced by Bernard Schwartz."[80] Charles La Bella, then head of the Department's campaign finance task force, agreed with Mr. Radek's assessment that "this was a matter which likely did not merit any investigation."[81]

A House select committee investigated allegations relating to United States technology transfers to China, and whether campaign contributions influenced export control decisions. In May 1999, the Committee findings were made public. The Committee's bipartisan findings also did not substantiate Rep. Weldon's suggestions of treason by the President.[82]

Allegation: In September 1998, Rep. David McIntosh sent a criminal referral to the Department of Justice alleging that White House Deputy Counsel Cheryl Mills provided false testimony to Congress and obstructed justice.[83] He told the *Washington Post* that there was "very strong evidence" that Ms. Mills lied to Congress.[84]

The Facts: Rep. McIntosh's claims were based on a run-of-the-mill document dispute. Ms. Mills believed that two documents out of over 27,000 pages of documents produced to the Government Reform and Oversight Committee were not responsive to a request from Rep. McIntosh, while Rep. McIntosh believed the two documents were responsive. Instead of viewing this disagreement as a difference in judgment, Rep. McIntosh charged that Ms. Mills was obstructing justice and that she lied to the Committee.[85] The Justice Department investigated Rep. McIntosh's allegations and found them to be without merit.[86]

Allegation: In October 1998, Rep. David McIntosh alleged that the President, First Lady, and senior Administration officials were involved in "theft of government property" for political purposes. To support this claim, Rep. McIntosh claimed that the President's 1993 and 1994 holiday card lists had been knowingly delivered to others outside of the government, and that, with respect to the holiday card project, evidence suggested a "criminal conspiracy to circumvent the prohibition on transferring data to the DNC."[87]

The Facts: The White House database, known as "WhoDB," is a computerized rolodex used to track contacts of citizens with the White House and to create a holiday card list. In putting together the holiday card list, the Clinton Administration followed the procedures established by previous administrations. A number of entities, including the White House and the Democratic National Committee, created lists of card recipients, and the White House hired an outside contractor to merge the lists, and produce and mail the cards. As with past Administrations, the production and mailing costs of the holiday card project were paid for by the President's political

party to avoid any appearance that taxpayer funds were being used to pay for greetings to political supporters.

The evidence showed that the contractor charged with eliminating duplicate names from the 1993 holiday card list failed to remove the list from its computer. This computer was subsequently moved – for unrelated reasons – to the 1996 Clinton/Gore campaign. The Committee uncovered no evidence that this list was ever used for campaign purposes. In fact, computer records showed that the Clinton/Gore campaign never accessed it, and it appears that the campaign was not aware that the computer contained this list.

With respect to the 1994 holiday card list, a DNC employee learned that the contractor charged with eliminating duplicate names from the list did not properly "de-dupe" the list. Therefore, she worked with her parents and several volunteers over a weekend to properly perform this task. The evidence indicates that neither the 1994 nor the 1993 holiday card list was used for any other purpose than sending out the holiday cards.[88]

Allegation: In March 1999, Chairman Burton sent a criminal referral to Department of Justice alleging that Charles Duncan, Associate Director of the Office of Presidential Personnel at the White House, made false statements to the Committee regarding the appointment of Yah Lin "Charlie" Trie to the Bingaman Commission.[89]

The Facts: Chairman Burton alleged that Mr. Duncan made false statements in his answers to Committee interrogatories in April 1998.[90] These answers included statements by Mr. Duncan that, to the best of his recollection, no one expressed opposition to him regarding the appointment of Mr. Trie to a trade commission known as the "Bingaman Commission."[91] The main basis for the Chairman's allegation was that Mr. Duncan's responses were "irreconcilable" with statements purportedly made by another witness, Steven Clemons.[92]

Investigation revealed that Mr. Clemons's statements were apparently misrepresented by Mr. Burton's staff. Mr. Clemons was interviewed by two junior majority attorneys without representation of counsel. Immediately after the majority released the majority staff's interview notes of the Clemons interview in February 1998, Mr. Clemons issued a public statement noting that he had never seen the notes, he had not been given the opportunity to review them for accuracy, and that "the notes have significant inaccuracies and misrepresentations . . . about the important matters which were discussed."[93] The Department of Justice closed its investigation of Mr. Duncan without bringing any charges.[94]

Allegation: In June 1999, Chairman Burton issued a press release accusing Defense Department officials of attempting to tamper with the computer of a Committee witness, Dr. Peter Leitner, of the Defense Threat Reduction Agency (DTRA), while he was testifying before the House Committee on Government Reform. The Chairman alleged, "While Dr. Leitner was telling my committee about the retaliation he suffered for bringing his concerns to his superiors and Congress, his supervisor was trying to secretly access his

computer. This smacks of mob tactics." He further commented, "George Orwell couldn't have dreamed this up."[95]

The Facts: Both the Committee and the Air Force Office of Special Investigations subsequently conducted investigations regarding the allegation of computer tampering. The Committee interviewed 11 DTRA employees, obtained relevant documents, and learned that the allegation was untrue. Instead, the incident was nothing more than a routine effort to obtain files in the witness's computer that were necessary to complete an already overdue project.

When Dr. Leitner was on leave to testify before the Committee on June 24, 1999, his superior, Colonel Raymond A. Willson, had reassigned a task of Dr. Leitner's to another DTRA employee. This reassignment -- responding to a letter from Senator Phil Gramm -- occurred because DTRA's internal due date for the project was passed and Dr. Leitner's draft response was not accurate. As part of reassigning the task, Col. Willson asked the office's technical division to transfer relevant files from Dr. Leitner's computer. The transfer never occurred, however, because the employee to whom the task was reassigned did not need Dr. Leitner's files to complete the task. Dr. Leitner's computer was not touched.[96]

On July 12, 1999, the Committee also learned that the Air Force Office of Special Investigations had completed its investigation and found that Col. Willson had done nothing improper.

Allegation: In July 1999 testimony before the House Rules Committee, Chairman Burton stated that the House Committee on Government Reform had received information indicating that the Attorney General "personally" changed a policy related to release of information by the Department of Justice so that an attorney she knew "could help her client."[97]

The Facts: One year after Chairman Burton testified before the Rules Committee, the House Government Reform Committee took testimony from the relevant witnesses at a July 27, 2000, hearing.

Chairman Burton's allegations concerned efforts by a Miami attorney, Rebekah Poston, to obtain information for her client, who had been sued in a Japanese court for libel by a Japanese citizen named Nobuo Abe. The alleged statements at the heart of this lawsuit related to whether Mr. Abe had been arrested or detained in Seattle in 1963. Mr. Abe maintained that he had never been detained and that statements to the contrary made by Ms. Poston's client were defamatory.[98] In order to support her client's interests in this lawsuit, Ms. Poston filed Freedom of Information Act (FOIA) requests with several components of the Department of Justice in November 1994 seeking records that established that her client's statement were true and that Mr. Abe had, in fact, been arrested or detained.

In response to Ms. Poston's FOIA requests, the INS, Bureau of Prisons, and Executive Office of the United States Attorneys informed Ms. Poston that no records on Mr. Abe existed.[99] The Department of Justice, however, initially informed Ms. Poston that it was its policy not to confirm or deny whether the Justice Department maintains such files on an individual unless the individual

authorizes such a confirmation or denial.[100] After Ms. Poston appealed this decision and threatened litigation on the matter, the Justice Department reversed its decision and confirmed to her that no records on Mr. Abe existed. This decision to confirm the lack of records was legal and it was damaging to Ms. Poston's client. The Justice Department official who directed this decision testified that he believed it was appropriate because it precluded potential litigation and did not deprive anyone of privacy rights because no release of records was involved.[101]

Although the Chairman suggested that the Attorney General "personally" changed Department policy to allow release of information, the records produced to the Committee show that the Attorney General recused herself from the decision.[102] John Hogan, who was Attorney General Reno's chief of staff at the time of Ms. Poston's FOIA request, testified before the House Government Reform Committee that the Attorney General "had no role in this decision whatsoever, initially or at any stage."[103]

Allegation: In August and September 1999, Chairman Burton alleged that Attorney General Reno had intentionally withheld evidence from Congress on the use of "military rounds" of tear gas, which may have some potential to ignite a fire, during the siege of the Branch Davidian compound in Waco, TX. Specifically, on a national radio news broadcast in August 1999, he stated that Attorney General Reno "should be summarily removed, either because she's incompetent, number one, or, number two, she's blocking for the President and covering things up, which is what I believe."[104]

Further, on September 10, 1999, Chairman Burton wrote the Attorney General regarding a 49-page FBI lab report that on page 49 references the use of military tear gas at Waco. He stated that the Department had failed to produce that page to the Committee on Government Reform during the Committee's Waco investigation in 1995, and asserted that this failure "raises more questions about whether this Committee was intentionally misled during the original Waco investigation."[105] In a subsequent television interview, Chairman Burton stated, "with the 49th page of this report not given to Congress when we were having oversight investigations into the tragedy at Waco and that was the very definitive piece of paper that could have given us some information, it sure looks like they were withholding information."[106]

The Facts: Evidence regarding the use of "military rounds" of tear gas was in Chairman Burton's own files at the time he alleged that the Department of Justice had withheld this information. Within days after Chairman Burton's allegations, the minority staff found several documents provided by the Department of Justice to Congress in 1995 that explicitly describe the use of military tear gas rounds at Waco on April 19, 1993.[107]

Further, contrary to Chairman Burton's allegations, the Department of Justice in fact had produced to the Committee copies of the FBI lab report that did include the 49th page. Former Senator John Danforth, whom the Attorney General appointed as a special counsel to conduct an independent investigation of Waco-related allegations, recently issued a report that commented as follows on document production to congressional committees:

> [W]hile one copy of the report did not contain the 49th page, the Committees were provided with at least two copies of the lab report in 1995 which did contain the 49th page. The Office of Special Counsel easily located these complete copies of the lab report at the Committees' offices when it reviewed the Committees' copy of the 1995 Department of Justice production. The Department of Justice document production to the Committees also included several other documents that referred to the use of the military tear gas rounds, including the criminal team's witness summary chart and interview notes. The Special Counsel has concluded that the missing page on one copy of the lab report provided to the Committees is attributable to an innocent photocopying error and the Office of Special Counsel will not pursue the matter further.[108]

Allegation: In November 1999, Chairman Burton appeared on television and claimed that FBI notes of interviews with John Huang show that the President was a knowing participant in an illegal foreign campaign contribution scheme. According to the Chairman, "Huang says that James Riady told the President he would raise a million dollars from foreign sources for his campaign," that "$700,000 was then raised by the Riady group in Indonesia," and that "that money was reimbursed by the Riadys through intermediaries in the United States. All that was illegal campaign contributions." He further stated: "[T]his $700,000 that came in – the President knew that James Riady was doing it. He knew it was foreign money coming in from the Lippo Group in Jakarta, Indonesia, and he didn't decline it. He accepted it, used it in his campaign, and got elected."[109]

The Facts: The FBI interview notes do not support the Chairman's allegation. The FBI notes of interviews with Mr. Huang do indicate that Mr. Riady, who was a legal resident at the time, told President Clinton that he would like to raise one million dollars.[110] The notes do not indicate, however, that Mr. Riady discussed the source of the contributions he intended to raise, and Mr. Huang told the FBI that he personally never discussed individual contributions or the sources of such contributions with the President.[111]

In December 1999, John Huang appeared before the Committee. He testified that he had no knowledge regarding whether President Clinton knew of foreign money coming from the Lippo group to his campaign, and that he did not believe that the President knew about it. He further stated that he had no knowledge that Mr. Riady indicated to the President the source of the money he intended to raise.[112] In addition, Mr. Huang testified that, as far as he knew, President Clinton had not participated in or had any knowledge of efforts to raise illegal foreign campaign contributions.[113]

Allegation: In December 1999, Chairman Burton alleged that the White House prevented White House Communications Agency (WHCA) personnel from filming the President meeting with James Riady, a figure from the campaign finance investigation, at an Asia-Pacific Economic Cooperation (APEC) summit meeting in New Zealand in September 1999. During a December 15, 1999, hearing entitled "The Role of John Huang and the Riady Family in Political Fundraising," Chairman Burton showed the two tapes made by the WHCA personnel, and then showed a video filmed by a press camera. Of the third

tape, the Chairman said:

> **That shows a little different picture. The White House tapes don't show it, but President Clinton really did pay some special attention to Mr. Riady. This White House is so consumed with covering things up that their taxpayer-funded photographer wouldn't even allow a tape to be made of the President shaking Mr. Riady's hand. No one minded the President meeting Mr. Riady. They just didn't want anyone to know how warmly he was greeted because of the problems surrounding Mr. Riady.**[114]

The Facts: President Clinton shook James Riady's hand in a rope line in New Zealand in September 1999. One of the WHCA cameras filming the President from the side stopped filming as the President greeted Mr. Riady. The other camera, filming the President head-on, panned away from the President as he moved down the rope line and did not return to him until he moved past Mr. Riady. The third camera, the camera Chairman Burton claimed was operated by a member of the press, captured the whole exchange between the President and Mr. Riady. This exchange lasted approximately 10 seconds and consisted of a handshake and a brief, inaudible conversation.

Committee staff interviewed Jon Baker, the person who operated the camera filming the President from the side, and Quinton Gipson, the person who operated the camera filming the President head-on. Mr. Baker told staff that no one instructed him not to film the President and Mr. Riady and he did not know who Mr. Riady was. Similarly, Mr. Gipson said he did not know who James Riady was and that he did not get any guidance about taping the event from anyone.

WHCA policy is to film any remarks the President gives, but not necessarily to film every move the President makes. WHCA camera operators do not take direction from the White House about how to cover events. Mr. Baker told Committee staff that he stopped filming when he did because he had to pack up his equipment and rush to join the motorcade and it was a coincidence that neither he nor the other cameraman captured the full exchange between the President and Mr. Riady.

Allegation: In July 2000, Chairman Burton said a videotape of a December 15, 1995, coffee at the White House indicates that Vice President Gore suggested that DNC issue advertisements be played for Democratic donor James Riady, who has been the subject of campaign finance probes. According to the Chairman, Vice President Gore "apparently states: 'We oughta, we oughta, we oughta show Mr. Riady the tapes, some of the ad tapes.'"[115]

The Facts: Chairman Burton played the videotape at a July 20, 2000, hearing of the Government Reform Committee. However, it was not possible to determine what was said on the tape. Further, it was impossible to determine to whom the Vice President was speaking because he was not on camera during the alleged comment. A *Reuters* reporter describing the playing of the videotape at the hearing wrote, "Gore's muffled words were not clear."[116]

When Chairman Burton played the tape on Fox Television's program *Hannity and Colmes*, the person whose job it is to transcribe the show transcribed the tape excerpt as follows:

> We ought to -- we ought to show that to (unintelligible) here, let (unintelligible) tapes, some of the ad tapes (unintelligible).[117]

Citations

1. The minority staff of the Government Reform Committee estimates that the costs of the congressional campaign finance investigations alone have exceeded $23 million. This figure includes $8.7 million that a 1998 General Accounting Office report found federal agencies reported spending on responding to congressional inquiries on campaign finance matters; over $8 million that the House Government Reform Committee has spent on its campaign finance investigation; $3.5 million that the Senate Governmental Affairs Committee spent on its campaign finance investigation; $1.2 million authorized for the House Committee on Education and the Workforce's investigation of allegations of campaign finance abuses concerning the Teamsters; and $2.5 million authorized for a select committee that investigated allegations that the Clinton Administration gave missile technology to China in exchange for campaign contributions. *See GAO Survey of Executive Branch Cost to Respond to Congressional Campaign Finance Inquiries* (June 23, 1998); House Committee on Government Reform and Oversight, *Interim Report: Investigation of Political Fundraising Improprieties and Possible Violations of Law, Additional and Minority Views,* 105th Cong, 3968-69 (1998) (H. Rept. 105-829). When the costs of investigating allegations in addition to the campaign finance allegations are included, the total costs likely significantly exceed $23 million. Many of these additional investigations involved substantial congressional resources as well as executive branch resources to respond to inquiries. For example, to investigate allegations concerning the government's actions at Waco, Texas, the House Government Reform Committee has conducted at least 82 interviews, and has received over 750,000 pages of documents from the Justice Department and the Defense Department in response to Committee requests.

2. CBS, *CBS Morning News* (Oct. 20, 1997).

3. CBS, *CBS This Morning* (Oct. 20, 1997).

4. NBC, *NBC News At Sunrise* (Oct. 20, 1997).

5. NBC, *Today* (Oct. 20, 1997).

6. ABC, *ABC World News Sunday* (Oct. 19, 1997).

7. CNN, *CNN Early Prime* (Oct. 19, 1997).

8. CNN, *CNN Morning News* (Oct. 20, 1997).

9. CNN, *Headline News* (Oct. 20, 1997).

10. CNN, *Early Edition* (Oct. 20, 1997).

11. Fox, *Fox Morning News* (Oct. 20, 1997).

12. Fox, *Fox News Now/Fox In Depth* (Oct. 20, 1997).

13. *Tapes May Have Been Altered, Rep. Burton Says; Clinton Aide Decries Chairman's 'Innuendo'* (Oct. 20, 1997).

14. *GOP Suggests Tapes Altered* (Oct. 20, 1997).

15. *GOP Suspects White House Altered Fund-raising Tapes* (Oct. 20, 1997).

16. *Panel May Use Lip Readers to Check Fund-raising Tapes* (Oct. 20, 1997).

17. *Tape-Tampering Denied* (Oct. 21, 1997).

18. Senator Thompson announced these findings on NBC's *Meet the Press* (Dec. 7, 1997). Only a handful of media outlets reported this announcement, and these reports focused on other campaign finance issues and mentioned the Thompson announcement only at the very end of the accounts. *E.g., Reno and Freeh to Testify, Morning Edition*, National Public Radio (Dec. 9, 1997) (reporting on the upcoming House Government Reform and Oversight Committee hearing on the independent counsel decision and noting Senator Thompson's announcement at the very end). Beyond coverage of Senator Thompson's announcement, one article reported that Paul Ginsburg, a technical expert hired by the Senate Governmental Affairs Committee, had found no signs of doctoring. *See Expert: Coffee Tapes Are Clean*, Newsday (Nov. 8, 1997), and the "Real Deal" segment at the end of *Face the Nation* on November 2, 1997, followed up on Rep. Burton's allegation to report that Mr. Ginsburg was going to report that there was no doctoring.

19. *See, e.g.,* Congressional Record, H5632 (July 13, 1994).

20. Office of Independent Counsel, *Report on the Death of Vincent W. Foster, Jr. (In Re: Madison Guaranty Savings & Loan Association)*, 5 (Oct. 10, 1997) (citing Federal News Service (Aug. 10, 1993)).

21. *Id.* at 7 (citing *Report of the Independent Counsel Robert B. Fiske, Jr., In Re: Vincent W. Foster, Jr.*, at 58).

22. *Id.* at 111.

23. *Former Clinton Aide Faces Questions on Memo; Document Suggests that First Lady Was Behind Firings in Travel Office*, Milwaukee Journal Sentinel (Jan. 6, 1996).

24. House Committee on Government Reform and Oversight, *Hearing, White House Travel Office – Day Three*, 104th Cong., 111 (Jan. 24, 1996).

25. Press Release, Office of the Independent Counsel (June 22, 2000).

26. Congressional Record, H6633 (June 20, 1996).

27. House Committee on Government Reform and Oversight, *Investigation of the White House and Department of Justice on Security of FBI Background Investigation Files*, 104th Cong., 16 (1996) (H. Rept. 104-862).

28. Office of Independent Counsel, *Report of the Independent Counsel (In Re: Madison Guaranty Savings and Loan Association) In Re: Anthony Marceca*, 7-8 (March 16, 2000).

29. CNN, *Late Edition with Frank Sesno* (Feb. 16, 1997).

30. Congressional Record, H4097 (June 20, 1997).

31. *See Senate Panel Is Briefed on China Probe Figure; Officials Say Evidence May Link L.A. Businessman to Election Plan*, Washington Post (Sept. 12, 1997).

32. *E.g.,* CBS Evening News (June 11, 1997); *Huang Leaked Secrets, GOP Lawmaker Says,* Los Angeles Times (June 13, 1997); *Republican Lawmaker Alleges Huang Passed Secrets; Communications with Lippo Group Questioned,* Baltimore Sun (June 13, 1997); *Congressman Says Evidence Confirms Huang Passed Secrets – The House Rules Chairman Says Information Was Given to the Lippo Group,* Fort Worth Star-Telegram (June 13, 1997); *Huang Gave Classified Data to Lippo, Lawmaker Claims,* Austin American-Statesman (June 13, 1997); *Huang Accused of 'Economic Espionage,'* Cincinnati Enquirer (June 13, 1997); *Legislator Alleges Fund-raiser Gave Classified Data to Overseas Company*, Las Vegas Review-Journal (June 13, 1997); *Dem Donor 'Breached Security' Lawmaker Accuses Ex-Clinton Appointee,* Arizona Republic (June 13, 1997); *Congressman Alleges Huang Passed Secret Data to Firm; White House, FBI Decline to Comment on Solomon's Remarks,* Milwaukee Journal Sentinel (June 13, 1997).

33. Gerald Solomon Interview FD-302 at 1 (Aug. 28, 1997).

34. Gerald Solomon Interview FD-302 at 1 (Feb. 11, 1998).

35. CNN, *Inside Politics* (Aug. 27, 1997).

36. *GOP Lawmaker Seeks Counsel to Probe O'Leary-Chung Tie,* Buffalo News (Aug. 22, 1997).

37. Notification to the Court Pursuant to 28 U.S.C. §592 (b) of Results of Preliminary Investigation (Dec. 2, 1997).

38. *Id.* The House Government Reform and Oversight Committee also discovered that fact. The Committee deposed several individuals, including Secretary O'Leary, to investigate the allegation by Mr. Chung regarding Secretary O'Leary. The Committee scheduled a hearing on the matter, but, upon discovering the allegation was false, canceled the hearing.

39. NBC's *Meet the Press* (Sept. 14, 1997).

40. *White House Denies Role in Audit of Jones; IRS Has History of Targeting 'Enemies,'* Washington Times (Sept. 16, 1997).

41. *E.g., Whistleblowers' Letter, Newspapers Alert Agency,* Washington Times (Sept. 29, 1997); *Conservatives Suspect IRS Audit Is Price of Opposing Clinton Policies,* Washington Times (Apr.

21, 1997); *Politics and the IRS,* Wall Street Journal (Jan. 9, 1997).

42. Staff of the Joint Committee on Taxation, *Report of Investigation of Allegations Relating to Internal Revenue Service Handling of Tax-Exempt Organization Matters* (March 2000).

43. *Id.* at 7.

44. House Committee on Government Reform and Oversight, *Hearings on Conduit Payments to the Democratic National Committee*, 105th Cong., 7 (Oct. 9, 1997) (H. Rept. 105-51).

45. *Id.* at 257, 271.

46. Minority Staff Report, House Committee on Government Reform and Oversight, *Evidence that John Huang Was in New York City on August 15, 16, 17, and 18* (Oct. 9, 1997).

47. House Committee on Government Reform, *Hearing on the Role of John Huang and the Riady Family in Political Fundraising*, 108 (Dec. 15, 1999) (stenographic record).

48. House Committee on Government Reform, *Hearing on the Role of Yah Lin "Charlie" Trie in Illegal Political Fundraising*, 250-52 (March 1, 2000) (stenographic record).

49. House Committee on Government Reform and Oversight, *Hearings on Campaign Finance Improprieties and Possible Violations of Law*, 105th Cong., 11-12 (Oct. 8, 1997) (H. Rept. 105-50).

50. Proffer of Nora and Gene Lum to the Committee on Government Reform and Oversight (Aug. 22, 1997).

51. *E.g.*, *Story of a Foreign Donor's Deal With '92 Clinton Camp Outlined*, Washington Post (Oct. 9, 1997); *House Panel to Hear of '92 Clinton Donation Problem Probe*, Los Angeles Times (Oct. 9, 1997).

52. Proffer of Nora and Gene Lum, *supra* note 50, at Part B.1-3.

53. Deposition of Richard C. Bertsch, House Committee on Government Reform and Oversight, ex. 12 (March 30, 1998). The letter was addressed to Richard Choi Bertsch, who worked for an organization called the Asian Pacific Advisory Council-VOTE ("APAC") which conducted get-out-the-vote and fund-raising activities in the Asian-American community in California in 1992. *Id.* at 10-13, 20-22.

54. CBS's *Face the Nation* (Oct. 19, 1997).

55. Senate Committee on Governmental Affairs, *Investigation of Illegal or Improper Activities in Connection with 1996 Federal Election Campaigns,* 105th Cong., v. 6, 9345-46 (1998) (S. Rept. No. 167); *Meet the Press* (Dec. 7, 1997) (interview with Senator Thompson).

56. Deposition of Joseph Simmons, House Committee on Government Reform and Oversight, 149 (Oct. 18, 1997); Deposition of Alan P. Sullivan, House Committee on Government Reform and Oversight, 37 (Oct. 17, 1997); Deposition of Steven Smith, House Committee on Government Reform and Oversight, 99 (Oct. 18, 1997).

57. The conservative publication *Insight* magazine reported that "dozens of big-time political donors or friends of the Clintons" had gained waivers of the eligibility rules regarding burials at Arlington National Cemetery. Without naming its sources, the article stated that a "national cemetery official" and other sources are "outraged that the Clinton White House has applied pressure to gain waivers for fat-cat donors." *Is There Nothing Sacred?*, Insight Magazine (dated Dec. 8, 1997, but reportedly released in advance of that date).

58. *White House Denies Burial Politics*, Atlanta Constitution (Nov. 21, 1997); *Burton to Probe Plots-for-Politics Allegations*, Indianapolis Star News (Nov. 21, 1997).

59. Press Release, Rep. Gerald Solomon (Nov. 20, 1997).

60. General Accounting Office, *Arlington National Cemetery: Authority, Process, and Criteria for Burial Waivers*, 2-3, appendix 1 (Jan. 28, 1998) (GAO/T-HEHS-98-81).

61. *Id.* at 1.

62. *Id.* at 9.

63. House Committee on Government Reform and Oversight, *Hearings on the Department of the Interior's Denial of the Wisconsin Chippewa's Casino Application*, 105th Cong., v.1, 106, 340 (Jan. 28, 1998).

64. Office of Independent Counsel, *Final Report of Independent Counsel In Re: Bruce Edward Babbitt,* 430, 441 (Aug. 22, 2000).

65. *Burton's Pursuit of President*, Indianapolis Star (Apr. 16, 1998).

66. Congressional Record, H4545 (June 11, 1998).

67. *Subpoena Widens Finance Probe; Request for White House Papers Covers 25 Categories, Copy Shows,* Washington Post (Aug. 15, 1997).

68. House Committee on Government Reform and Oversight, *Investigation of Political Fundraising Improprieties and Possible Violations of Law,* 105th Cong, 3978 (1998) (H. Rept. 105-829).

69. Letter from Rep. Henry Waxman to Chairman Dan Burton (May 3, 1998).

70. *Bridling G.O.P. Leader Says Tapes Speak for Themselves*, New York Times (May 5, 1998); *Burton Defends Hubbell Transcript Actions*, Washington Post (May 5, 1998).

71. *Opening Statement by Chairman Burton*, House Committee on Government Reform and Oversight, Business Meeting, 6-13 (Apr. 23, 1998); Congressional Record, H2338 (Apr. 28, 1998); Congressional Record, H2444 (Apr. 29, 1998).

72. Congressional Record, H2336 (Apr. 28, 1998).

73. Congressional Record, H3453 (May 19, 1998).

74. House Committee on Government Reform and Oversight, Business Meeting, 87 (Apr. 23, 1998) (stenographic record).

75. Deposition of Larry Wong, House Committee on Government Reform and Oversight, 13-14, 19, 26-27, 43, 52, 57 (July 27, 1998).

76. *Id.* at 85.

77. Congressional Record, H3239 (May 13, 1998).

78. *GOP Breaking China Over Clinton's Deals,* National Journal (May 23, 1998).

79. *See Internal Justice Memo Excuses Loral*, Los Angeles Times (May 23, 2000).

80. Memorandum from Lee Radek to James Robinson, Assistant Attorney General, Criminal Division (Aug. 5, 1998).

81. The Addendum to Interim Report for Janet Reno and Louis Freeh Prepared by Charles La Bella and James DeSarno (Aug. 12, 1998).

82. House Select Committee on U.S. National Security and Military/Commercial Concerns with the People's Republic of China, 105th Cong., 2nd Sess. (Committed to the Committee of the Whole House, Jan. 3, 1999; Declassified in Part, May 25, 1999) (H. Rept. 105-851).

83. Letter from Rep. David McIntosh to Attorney General Janet Reno (Sept. 17, 1998).

84. *Database Criminal Probe Sought,* Washington Post (Sept. 9, 1998).

85. Letter from Rep. David McIntosh to Attorney General Janet Reno (Sept. 17, 1998); House Committee on Government Reform and Oversight, *Investigation of the Conversion of the $1.7 Million Centralized White House Computer System, Known as the White House Database, and Related Matters*, 105th Cong., 574-581 (Oct. 30, 1998) (H. Rept. 105-828).

86. Letter from M. Faith Burton, Special Counsel to the Assistant Attorney General, to Rep. David McIntosh (May 6, 1999).

87. House Committee on Government Reform and Oversight, *Investigation of the Conversion of the $1.7 Million Centralized White House Computer System, Known as the White House Database, and Related Matters*, 105th Cong., 1-6, 33-44 (Oct. 30, 1998) (H. Rept. 105-828).

88. *Id.*, Minority Views, 564-68.

89. Letter from Chairman Dan Burton to Attorney General Janet Reno (March 22, 1999).

90. *Id.*

91. Charles Duncan's Responses to Interrogatories (Apr. 20, 1998).

92. Letter from Chairman Dan Burton to Attorney General Janet Reno, *supra* note 89.

93. Statement of Steven C. Clemons (Feb. 25, 1998); Letter from Rep. Henry A. Waxman to Attorney General Janet Reno (Apr. 13, 1999).

94. Statement of Alan Gershel, Deputy Assistant Attorney General, Department of Justice, House Committee on Government Reform, *Hearing on Contacts between Northrop Grumman Corporation and the White House Regarding Missing White House E-Mails* (Sept. 26, 2000).

95. Press Release, Chairman Burton, *Burton Angered by Harassment of Witness* (June 29, 1999).

96. Letter from Rep. Henry Waxman to Chairman Dan Burton (July 15, 1999).

97. Testimony of Chairman Dan Burton, House Rules Committee (July 15, 1999) (available at www.house.gov/reform/oversight/99_07_15db-rules.htm).

98. *See* Letter from Russell J. Bruemmer, Wilmer, Cutler & Pickering, to Richard L. Huff, Co-Director, Office of Information and Privacy, Department of Justice (March 31, 1995).

99. Letter from Wallace H. Cheney, Assistant Director/General Counsel, Federal Bureau of Prisons, to Joseph M. Gabriel, Law Offices of Langberg, Leslie and Gabriel (March 2, 1995); Letter from Bonnie L. Gay, Attorney-in-Charge, FOIA/PA Unit, Executive Office of United States Attorneys, Department of Justice, to Joseph M. Gabriel (Dec. 15, 1994); *See* Letter from Magda S. Ortiz, FOIA/PA Reviewing Officer, Immigration and Naturalization Service, to Rebekah Poston (Dec. 6, 1994) (explaining that a potentially responsive record was illegible and requesting additional information); Letter from Russell J. Bruemmer, Wilmer, Cutler & Pickering, to Richard L. Huff, Co-Director, Office of Information and Privacy, Department of Justice (March 31, 1995) (explaining that the INS searched for, but ultimately could not find, a record responsive to the FOIA request).

100. Testimony of Richard Huff and Rebekah Poston, House Government Reform Committee, *Felonies and Favors: A Friend of the Attorney General Gathers Information from the Justice Department*, 129-31 (July 27, 2000) (stenographic record).

101. Testimony of John Schmidt and John Hogan, House Committee on Government Reform, *Felonies and Favors: A Friend of the Attorney General Gathers Information from the Justice Department*, 120-23, 128, 140-41 (July 27, 2000) (stenographic record).

102. Memorandum from Attorney General Janet Reno to Staff of the Attorney General (Apr. 28, 1995).

103. House Committee on Government Reform, *Felonies and Favors: A Friend of the Attorney General Gathers Information from the Justice Department,* 154 (July 27, 2000) (stenographic record).

104. *Morning Edition*, National Public Radio (Aug. 31, 1999).

105. Letter from Chairman Burton to Attorney General Janet Reno (Sept. 10, 1999).

106. Fox News, *Fox News Sunday* (Sept. 12, 1999).

107. Letter from Rep. Henry Waxman to John Danforth, Special Counsel (Sept. 13, 1999); FBI FD-302 of FBI Agent (June 9, 1993) (reporting that a pilot heard "a high volume of [Hostage Rescue Team] traffic and Sniper [Tactical Operations Command] instructions regarding . . . the insertion of gas by ground units," including "one conversation, relative to utilization of some sort of military round to be used on a concrete bunker"); FBI H.R.T. Interview Schedule (Nov. 9, 1993) (summarizing an interview with an FBI agent and stating that "smoke on film came from attempt to penetrate bunker w/1 military and 2 ferret rounds" and further describing the military round as "Military was . . . bubblehead w /green base"); Handwritten notes (April 19, 1993) (making repeated references to military rounds fired on April 19, 1993, such as "smoke from bunker came when these guys tried to shoot gas into the bunker (military gas round)").

108. John C. Danforth, Special Counsel, *Interim Report to the Deputy Attorney General Concerning the 1993 Confrontation at the Mt. Carmel Complex, Waco, Texas*, 54 (July 21, 2000).

109. MSNBC, *Watch It! With Laura Ingraham* (Nov. 2, 1999).

110. John Huang Interview FD-302 at 19 (Jan. 19 - Feb. 10, 1999).

111. John Huang Interview FD-302 at 129 (Feb. 23 - March 26, 1999).

112. House Committee on Government Reform, *Hearings on the Role of John Huang and the Riady Family in Political Fundraising,* 104 (Dec. 15, 1999) (stenographic record).

113. *Id.* at 95.

114. House Committee on Government Reform, *Hearings on the Role of John Huang and the Riady Family in Political Fundraising,* 15-16 (Dec. 15, 1999) (stenographic record).

115. Letter from Chairman Dan Burton to Attorney General Janet Reno, 2 (July 18, 2000).

116. *Justice Department Won't Discuss Gore Video*, Reuters (July 21, 2000).

117. Fox, *Hannity and Colmes* (July 19, 2000).